Supreme Court
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No.

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IN THE

Supreme Court of the United States

MEDIA GENERAL, INC.

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI AND APPENDIX VOLUME I

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QUESTIONS PRESENTED

1. Whether this Court should reconsider its ruling in *FCC v. National Citizens Comm. for Broad.* ("*NCCB*"), 436 U.S. 775 (1978), based on *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969), that broadcast "scarcity" allows only rational basis review under the First Amendment of newspaper/broadcast cross-ownership restrictions, and that such restrictions survive First Amendment scrutiny.

2. Whether this Court should reconsider its ruling in *NCCB* that broadcast ownership restrictions targeted at a single non-broadcast medium, newspapers, are subject only to rational basis review under the First Amendment and the equal protection component of the Fifth Amendment, and that such restrictions survive First and Fifth Amendment scrutiny.

3. Whether this Court should reconsider its ruling in *NCCB* that newspaper/broadcast cross-ownership restrictions specifically directed at promoting "diversity" are content neutral, and thus are subject only to rational basis review under the First Amendment, and that such restrictions survive First Amendment scrutiny.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioner Media General, Inc. states that (i) it has no parent corporation; (ii) affiliates of Gabelli Asset Management, Inc. own 25.8% of its outstanding publicly traded stock; and (iii) no other publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

INTRODUCTION 1

OPINIONS BELOW 3

JURISDICTION 3

PERTINENT CONSTITUTIONAL PROVISIONS 3

STATEMENT OF THE CASE 4

A. The History Of Media Cross-Ownership Restrictions And The Telecommunications Act Of 1996 4

B. Petitioner Media General And Its Convergence Strategy 5

C. The FCC Order Under Review 6

D. The Third Circuit Proceedings 7

REASONS FOR GRANTING THE WRIT 10

I. This Court Should Reconsider Its Rulings In *Red Lion* And *NCCB* That Broadcast "Scarcity" Demands A Uniquely Deferential Standard Of Judicial Review Of Broadcast Regulations Under The First Amendment. 10

A. This Court Adopted The Scarcity Doctrine In *Red Lion*, And Applied That Doctrine To The Newspaper/Broadcast Cross-Ownership Ban In *NCCB*, Based On The State Of Technology In The 1960s And 70s. 11

B. The Lower Courts Have Criticized *Red Lion*'s Scarcity Doctrine, But Are Powerless To Jettison It 14

C. The Time Has Come For This Court To Jettison The Scarcity Doctrine 18

II. This Court Should Reconsider Its Ruling In *NCCB* That The First Amendment And The Equal Protection Component Of The Fifth Amendment Require Only Deferential Review Of Cross-Ownership Restrictions Targeted At A Single Non-Broadcast Medium, Newspapers. 23

III. This Court Should Reconsider Its Ruling In *NCCB* That Restrictions On Broadcast Ownership Specifically Directed At Promoting Diversity Are Content Neutral, And Thus Trigger Only Deferential Review Under The First Amendment. 26

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Action for Children's Television v. FCC,
58 F.3d 654 (D.C. Cir. 1995) 13, 15, 22
Agostini v. Felton,
521 U.S. 203 (1997) 17
Arkansas AFL-CIO v. FCC,
11 F.3d 1430 (8th Cir. 1993) 16, 17
Arkansas Writers' Project, Inc. v. Ragland,
481 U.S. 221 (1987) 23, 25, 26
Bolling v. Sharpe,
347 U.S. 497 (1954) 23
Branch v. FCC,
824 F.2d 37 (D.C. Cir. 1987) 17
Brandywine-Main Line Radio, Inc. v. FCC,
473 F.2d 16 (D.C. Cir. 1972) 18
Buckley v. Valeo,
424 U.S. 1 (1976) 29
CBS, Inc. v. DNC,
412 U.S. 94 (1973) 19
Consolidated Edison Co. v. Public Serv. Comm'n of N.Y.,
447 U.S. 530 (1980) 27
Denver Area Educ. Telecomms. Consortium, Inc. v. FCC,
518 U.S. 727, 812-13 (1996) 12, 19
FCC v. League of Women Voters of Calif.,
468 U.S. 364 (1984) 3, 12, 19, 29
FCC v. National Citizens Comm. for Broad.,
436 U.S. 775 (1978) ..... *passim*
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435 U.S. 765 (1978) 28
Fox Television Stations, Inc. v. FCC,
280 F.3d 1027 (D.C. Cir. 2002) 7, 17

Grosjean v. American Press Co.,
297 U.S. 233 (1936) 25
Hohn v. United States,
524 U.S. 236 (1998) 17
Loveday v. FCC,
707 F.2d 1443 (D.C. Cir. 1983) 15
Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue,
460 U.S. 575 (1983) 25
Public Serv. Comm'n v. FPC,
472 F.2d 1270 (D.C. Cir. 1972) 8
Radio-Television News Dirs. Ass'n v. FCC,
184 F.3d 872 (D.C. Cir. 1999) 17
Red Lion Broad. Co. v. FCC,
395 U.S. 367 (1969) ..... *passim*
Reno v. ACLU,
521 U.S. 844 (1997) 13
Rodriguez de Quijas v. Shearson/Am. Express, Inc.,
490 U.S. 477 (1989) 17
Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,
502 U.S. 105 (1991) 26
Sinclair Broad. Group, Inc. v. FCC,
284 F.3d 148 (D.C. Cir. 2002) 7, 21, 27
State Oil Co. v. Khan,
522 U.S. 3 (1997) 9, 17, 25
Telecommunications Research & Action Ctr. v. FCC,
801 F.2d 501 (D.C. Cir. 1986) 15
Time Warner Entm't Co. v. FCC,
105 F.3d 723 (D.C. Cir. 1997) 16
Tribune Co. v. FCC,
133 F.3d 61 (D.C. Cir. 1998) 16
Turner Broad. Sys., Inc. v. FCC,
512 U.S. 622 (1994) ..... *passim*
Ward v. Rock Against Racism,
491 U.S. 781 (1989) 26

STATUTES AND RULES

28 U.S.C. § 1254(1) 3
28 U.S.C. § 2112(a) 8
Telecommunications Act Of 1996,
Pub. L. No. 104-104, 110 Stat. 56 (1996) 4

ADMINISTRATIVE AUTHORITIES

In re 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,
18 F.C.C.R. 13,620 (2003) 3
In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,
19 F.C.C.R. 1606 (2004) 23
In re Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,
17 F.C.C.R. 18,503 (2002) 5
In re Compl. of Syracuse Peace Council,
2 F.C.C.R. 5043 (1987),
pet. for review denied,
867 F.2d 654 (D.C. Cir. 1989) 19, 20, 22
In re Cross-Ownership of Broadcast Stations and Newspapers,
16 F.C.C.R. 17,283 (2001) 5
See In re Rules Relating to Multiple Ownership of Standard, FM, & Television Broad. Stations,
50 F.C.C.2d 1046 (1975) 4

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Willful Denial & First Amendment Jurisprudence,
Remarks Before the Media Institute,
Washington, D.C. (Apr. 22, 1998), available at
http://www.fcc.gov/Speeches/Powell/spmkp808.html ... 21
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Personal Attack & Political Editorial Rules,
13 F.C.C.R. 21,929 (1998) 21
Sullivan, Kathleen M.,
Free Speech and Unfree Markets,
42 U.C.L.A. L. Rev. 949 (1995) 29
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91 Geo. L.J. 245 (2003) 22

INTRODUCTION

In an age when the First Amendment has been interpreted to protect such activities as nude dancing and cross burning, this case calls for a return to basics. At issue here is a content-based restriction on speech: the Federal Government, for the avowed purpose of promoting broadcast "diversity," is restricting the ability of newspaper owners, like petitioner Media General, to acquire broadcast stations in the communities they serve. Those restrictions directly abridge Media General's First Amendment right to deliver enhanced quality local news to those communities.

But for the fact that broadcast speech is involved, there would be no question that these content-based restrictions would be subject to heightened judicial scrutiny: in a free society, the Government is not in the business of muzzling certain voices for the avowed purpose of enhancing others. Under current jurisprudence, however, restrictions on broadcast speech are subject only to rational basis review. *See, e.g., Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969); *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775 (1978) ("*NCCB*"). Applying that hyper-deferential standard of review, the Third Circuit below not only affirmed an order of the Federal Communications Commission ("FCC") retaining newspaper/broadcast cross-ownership restrictions, but actually remanded that order to the extent it sought to relax those restrictions. That decision highlights the need for this Court to reexamine its jurisprudence in this area in three vital respects.

First, it is high time to revisit the doctrine of broadcast "scarcity" embraced by this Court in *Red Lion* as the basis for deferential judicial review of broadcast regulation. Over the past generation, there has been a communications revolution, with an explosion of new media sources and outlets. The law, however, has remained frozen in a pre-revolutionary state based on *Red Lion*. Given our hierarchical judicial system, the lower courts are in no position to adapt to the change, even though the

FCC itself has long since repudiated the underlying premise of broadcast "scarcity." Rather, the lower courts are forced to state—as did the court below—that they are constrained by this Court's precedents, and that it is this Court's prerogative to address the ongoing vitality of those precedents. Accordingly, there is no prospect of lower-court percolation on these issues, and this Court alone has both the opportunity and the responsibility to reconsider its outmoded precedents.

Second, just as it is high time to reconsider *Red Lion*'s "scarcity" doctrine applicable to broadcast regulation generally, it is high time to reconsider *NCCB*'s related holding with respect to newspaper/broadcast cross-ownership restrictions specifically. Although those restrictions uniquely target a single non-broadcast medium, newspapers, *NCCB* dismissed a constitutional challenge to such differential treatment by asserting that newspaper owners were treated "in essentially the same fashion as other owners of the major media of mass communications," 436 U.S. at 801—*i.e.*, owners of radio and television broadcast stations, who also were restricted in their ability to own multiple stations. Again, the Third Circuit below declared that it was bound by that holding, and again, that holding simply cannot be squared with current technological or regulatory reality. Today there are multiple other "major media of mass communication" not covered by broadcast ownership restrictions, including—most obviously—cable television and the Internet. When owners of cable television stations and Internet sites are free to buy broadcast stations at will, it is evident that the FCC's newspaper/broadcast cross-ownership restrictions are wildly underinclusive, and newspaper owners are being singled out for disfavored treatment. Accordingly, heightened judicial scrutiny of the restrictions is warranted on this ground alone.

And *third*, it is high time to reconsider *NCCB*'s holding that newspaper/broadcast cross-ownership restrictions "are not content related." The very *premise* of the restrictions is that

they will affect the content of broadcast speech, by promoting "diversity." Regardless of the validity of that premise, there can be no dispute that it is explicitly content-based. Content-based restrictions on speech, however—even in the broadcast context—are subject to heightened scrutiny, *see, e.g., FCC v. League of Women Voters of Calif.*, 468 U.S. 364, 383-84 (1984), and *NCCB*'s unexplained contrary holding on this score stands out as an anomaly.

In short, the time has come for this Court to revisit the outdated and untenable premises that compelled the Third Circuit to give Media General's constitutional challenge the back of the hand. Because those restrictions cannot remotely survive heightened scrutiny, and were not subjected to such scrutiny below, this Court should grant certiorari, clarify the appropriate standard of review, and invalidate the restrictions.

OPINIONS BELOW

The Third Circuit's decision is reported at 373 F.3d 372 and reprinted in the Appendix ("App.") at 1-190a. The FCC order under review is reported at 18 F.C.C.R. 13,620 and 2003 WL 21511828 (2003), and reprinted at App. 206-658a.

JURISDICTION

The Third Circuit rendered its decision on June 24, 2004, App. 2a, and denied a timely petition for rehearing on September 3, 2004, App. 191-93a. Justice Souter extended the time to file this petition to and including January 31, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS

The First Amendment provides in pertinent part: "Congress shall make no law ... abridging the freedom of speech, or of the press ...."

The Fifth Amendment provides in pertinent part: "No person shall be ... deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

A. The History Of Media Cross-Ownership Restrictions And The Telecommunications Act Of 1996

The origins of this case go back to 1975, when the FCC issued an order prospectively barring any person or entity that owned a newspaper in a particular community from buying a broadcast station in that community. *See In re Rules Relating to Multiple Ownership of Standard, FM, & Television Broad. Stations*, 50 F.C.C.2d 1046 (1975), *codified at* 47 C.F.R. §§ 73.35, 73.240, 73.636 (1976).

That order was promptly challenged on both First Amendment and Equal Protection grounds, but this Court rejected those challenges. *See NCCB*, 436 U.S. 775. The Court acknowledged that the FCC's rulemaking record was "inconclusive[]" with respect to the alleged link between diversity of broadcast ownership and the "hoped-for" diversity of broadcast viewpoints, but (applying the deferential standard of review from *Red Lion*, 395 U.S. 367) held that the Commission had acted "rationally" in concluding that "diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints." 436 U.S. at 786, 796. The Court also asserted that the newspaper/broadcast cross-ownership ban was "not content related," *id.* at 801, and that it did not unconstitutionally single out newspaper owners because "the regulations treat newspaper owners in essentially the same fashion as other owners of the major media of mass communications," *id.*

The decades following *NCCB* witnessed explosive change in telecommunications and media, and Congress responded by enacting the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). That Act implemented a "pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector development of advanced telecommunications and information technologies and services

to all Americans by opening all telecommunications markets to competition." H.R. Rep. No. 104-458, at 1 (1996). The Act thus relaxed or abolished several existing restrictions on broadcast ownership, and instructed the FCC to review its remaining ownership restrictions every other year "to determine whether any of such rules are necessary in the public interest as the result of competition." 1996 Act § 202(h). The Act further directed the Commission, in the course of that review, to "repeal or modify any regulation it determines to be no longer in the public interest." *Id.*

Pursuant to this mandate, the FCC in 2001 issued a Notice of Proposed Rulemaking regarding its newspaper/broadcast cross-ownership rule, solicited comments from interested parties, and compiled a voluminous record. *See In re Cross-Ownership of Broadcast Stations and Newspapers*, 16 F.C.C.R. 17,283 (2001). The Commission subsequently initiated an omnibus proceeding to consider all its broadcast ownership rules and consolidated the newspaper/broadcast cross-ownership proceeding with that new docket. *See In re Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 17 F.C.C.R. 18,503 (2002). Many interested parties, including petitioner Media General, Inc., filed comments.

B. Petitioner Media General And Its Convergence Strategy

Media General, a publicly owned communications company based primarily in the southeastern United States, has an intense interest in the fate of the FCC's newspaper/broadcast cross-ownership restrictions. The company owns a variety of media outlets, including newspapers, broadcast television stations, interactive media, and diversified information services. In Tampa/St. Petersburg, Florida, Media General owns both a television station and a newspaper by virtue of "grandfathering" prior to the 1975 cross-ownership ban. In four other media

markets, Media General currently owns both a broadcast station and a newspaper by virtue of the FCC's position that a broadcast station owner is allowed to buy and hold a newspaper until the station's next license renewal.

In operating these newspaper/broadcast cross-ownerships, Media General has become one of the media's leading practitioners of "convergence," the melding of newspaper, broadcast television, and online resources in the preparation and dissemination of local news. In Media General's experience, ownership of multiple media outlets in a particular market enhances its ability to provide enhanced and insightful local news coverage that distinguishes its news outlets and attracts consumers. Its Tampa News Center is the most advanced convergence laboratory in the Nation, and the only one where a newspaper, a television station, and an online division are located together under one roof. Thus, as Media General explained in its comments to the FCC, convergence has allowed the company to pool its resources for news gathering, and thereby deliver better, faster, and deeper local news.

C. The FCC Order Under Review

The FCC, however, rejected Media General's call to repeal all newspaper/broadcast cross-ownership restrictions. As an initial matter, the Commission dismissed Media General's argument that any regulation in this area must satisfy heightened scrutiny. App. 218a. As the Commission explained, "courts have considered and consistently rejected the arguments for a stricter standard of First Amendment scrutiny of broadcast regulation .... Accordingly, the rational basis test continues to apply to our ownership rules." *Id.* In addition, the Commission specifically rejected Media General's argument that the cross-ownership rule, given its explicit diversity rationale, was "inherently content based." *Id.* According to the Commission, "[a]s the Supreme Court noted in *NCCB*, the cross-ownership rules at issue were 'not content related.'" *Id.* (quoting *NCCB*, 436 U.S. at 801).

Rather than repealing all newspaper/broadcast cross-ownership restrictions, the FCC instead relaxed those restrictions somewhat. In markets with three or fewer broadcast television stations, the Commission retained the absolute ban. App. 521a. In markets with nine or more broadcast television stations, the Commission lifted all restrictions. App. 534a. And in markets with four to eight broadcast television stations, the Commission adopted a graduated approach, allowing a single entity to own a newspaper and either (a) one television station and up to 50% of the radio stations that may be commonly owned in that market under the Commission's local radio rule, or (b) up to 100% of the radio stations allowed under the local radio rule. App. 530-31a. These new regulations still restricted newspaper/broadcast cross-ownership in more than half of the Nation's media markets, which have eight or fewer broadcast television stations. In drawing these lines, the Commission looked to a so-called "Diversity Index" that purported to quantify "diversity." *See id.* at 479-508a.

The consolidated order also addressed five other broadcast ownership rules: (1) the local television ownership rule, App. 289-367a; (2) the local radio ownership rule, App. 367-429a; (3) the radio-television cross-ownership rule, App. 465-79a; (4) the national television ownership rule, App. 552-610a; and (5) the dual network rule, App. 610-29a.

D. The Third Circuit Proceedings

Media General and other media companies (collectively the "Deregulatory Petitioners") promptly filed petitions for review of the FCC's order in the D.C. Circuit, which had previously reviewed—and remanded—two of the media ownership rules addressed in the order. *See Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002). A number of public interest and consumer advocacy groups (collectively the "Regulatory Petitioners"), however, filed petitions for review in other circuits, thereby triggering a lottery under 28 U.S.C.

§ 2112(a). That lottery randomly assigned all of the petitions for review to the Third Circuit.

The Regulatory Petitioners promptly moved for a stay of the FCC order, which the Third Circuit granted. App. 194-96a. Even though the Regulatory Petitioners could not show any immediate and/or irreparable injury from the FCC order (since it did not actually authorize any particular transaction), the court declared that "[t]he harm to [the Regulatory Petitioners] absent a stay would be the likely loss of an adequate remedy should the new ownership rules be declared invalid in whole or in part." App. 195a.

By a divided vote, the Third Circuit panel then denied the Deregulatory Petitioners' motion to transfer the case to the D.C. Circuit, which had previously reviewed and remanded two of the media ownership rules consolidated by the Commission. App. 197-205a. As the motion explained, never before had a court randomly selected to review an agency decision on remand from another court refused to transfer the case to the remanding court. Chief Judge Scirica dissented, emphasizing "the fundamental jurisprudential underpinning that agency decisions on remand should be reviewed by the remanding court." App. 203a (citing *Public Serv. Comm'n v. FPC*, 472 F.2d 1270, 1272 (D.C. Cir. 1972)). The Deregulatory Petitioners sought *en banc* review of the refusal to transfer, but the panel majority (again over Chief Judge Scirica's dissent) refused even to refer the matter to the *en banc* court.

The same divided panel of the Third Circuit subsequently ruled against the Deregulatory Petitioners virtually across the board, and remanded much of the FCC order for going too far in a deregulatory direction. App. 1-107a.

With respect to the newspaper/broadcast cross-ownership restrictions, the Third Circuit first rejected the Deregulatory Petitioners' argument that both the First Amendment and the equal protection component of the Fifth Amendment mandate

heightened judicial scrutiny of the FCC's order. According to the court, the Deregulatory Petitioners' First Amendment challenge was "foreclosed" by this Court's decision in *NCCB*. App. 46a. "Due to the 'physical scarcity' of the broadcast spectrum," the court asserted, "the [*NCCB*] Court scrutinized the [cross-ownership] regulation to discern a rational basis." *Id.* The Third Circuit acknowledged the Deregulatory Petitioners' argument that the scarcity doctrine had been rendered obsolete by technological advances, but "decline[d] the[] invitation to disregard Supreme Court precedent." *Id.* Accordingly, the Third Circuit reviewed the FCC's newspaper/broadcast cross-ownership restrictions under "a rational basis standard," and held that "the Commission's continued regulation of the common ownership of newspapers and broadcasters does not violate the First Amendment rights of either." App. 47-48a.

The Third Circuit rejected the Deregulatory Petitioners' equal protection challenge to the differential treatment of newspapers on similar grounds. According to the court, that challenge too was "foreclosed" by *NCCB*, and the court again "decline[d] the ... invitation to disregard Supreme Court precedent because of changing times." App. 46a; *see also id.*("[I]t is the Supreme Court's prerogative to change its own precedent.") (citing *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)).

The panel majority then proceeded to remand the revised newspaper/broadcast cross-ownership restrictions. Although the panel majority declared that "reasoned analysis supports the Commission's determination that the blanket ban on newspaper/broadcast cross-ownership was no longer in the public interest," App. 40a, the panel majority proceeded to poke holes in the so-called "Diversity Index" to which the FCC looked in drawing the lines, *see* App. 48-63a. Accordingly, the panel majority remanded the new newspaper/broadcast cross-ownership restrictions "for the Commission to justify or modify its approach to setting numerical limits." App. 107a. The court

left in place its stay of the FCC order with respect to newspaper/broadcast cross-ownership, thereby effectively preserving the blanket 1975 ban. The panel majority also expressly retained jurisdiction over the proceedings on remand, *see id.*, thereby ensuring that any future challenges to any order would be channeled back not only to the Third Circuit, but to the same panel.

REASONS FOR GRANTING THE WRIT

I. This Court Should Reconsider Its Rulings In *Red Lion* And *NCCB* That Broadcast "Scarcity" Demands A Uniquely Deferential Standard Of Judicial Review Of Broadcast Regulations Under The First Amendment.

This case provides this Court with the opportunity to bring its First Amendment jurisprudence regarding government regulation of broadcast media into the twenty-first century. As this Court has acknowledged, "our cases have permitted more intrusive regulation of broadcast speakers than of speakers in other media." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994). Thus, although broadcasting is a vital medium of speech in our modern society, government regulation of broadcasting—including the cross-ownership restrictions at issue here—is subject only to the deferential rational-basis judicial review generally applicable to government regulation of non-communicative economic activity. *See FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775 (1978) ("*NCCB*"). Since this Court's decision thirty-six years ago in *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969), that anomalous state of affairs has been justified under a theory of broadcast "scarcity." Even assuming that this theory was sound as an original matter, courts and commentators have recognized that it is not sound any longer. But, as the Third Circuit noted in the decision below, the lower courts are bound to apply *Red Lion*'s "scarcity" doctrine unless and until this Court reconsiders that doctrine. Media General now respectfully urges this Court to do just that.

A. This Court Adopted The Scarcity Doctrine In *Red Lion*, And Applied That Doctrine To The Newspaper/Broadcast Cross-Ownership Ban In *NCCB*, Based On The State Of Technology In The 1960s And 70s.

Thirty-six years ago, in *Red Lion*, this Court sharply limited judicial review of broadcast regulation under a theory of broadcast "scarcity." *See* 395 U.S. at 386-90. That theory is based on the premise that the broadcast spectrum is a "scarce resource" because "there are substantially more individuals who want to broadcast than there are frequencies to allocate." *Id.* at 388, 391. In order to prevent "overcrowd[ing of] the spectrum," the Court held that "the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium." *Id.* at 389-90. Accordingly, the *Red Lion* Court rejected a First Amendment challenge to the FCC's so-called "fairness doctrine," which required broadcasters to give adequate coverage to public issues and ensure that coverage was fair and accurately reflected opposing views. *See id.* at 377-78. The *Red Lion* Court acknowledged, however, that technological advances might render the scarcity doctrine obsolete, and therefore rested its holding on "the present state of commercially acceptable technology." *Id.* at 388.

Nine years later, in *NCCB*, the Court applied *Red Lion*'s scarcity rationale in analyzing the FCC's 1975 ban on newspaper/broadcast cross-ownership. 436 U.S. 775. As the Court explained, "[t]he physical limitations of the broadcast spectrum are well known," and "[i]n light of this physical scarcity, Government allocation and regulation of broadcast frequencies are essential." *Id.* at 799 (citing *Red Lion*, 395 U.S. at 375-77, 387-88). Accordingly, the *NCCB* Court submitted the cross-ownership ban only to rational-basis review. In particular, the Court acknowledged that the evidence was "inconclusive" as to whether the ban would promote the

"hoped-for" viewpoint diversity, but accepted at face value the FCC's prediction that "[i]ncreases in diversification of ownership would possibly result in enhanced diversity of viewpoints." *Id.* at 786, 796-97; *see also id.* at 796 (holding that the FCC "acted *rationally* in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints") (emphasis added).

NCCB represented the high-water mark of the scarcity doctrine; over the ensuing generation, this Court has declined to extend that doctrine and pointedly noted that it has been widely criticized. Thus, in *FCC v. League of Women Voters of Calif.*, the Court observed that "[t]he prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years" in light of technological advances, but stated that "[w]e are not prepared ... to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." 468 U.S. 364, 376 n.11 (1984).

A decade later, in *Turner*, this Court once again acknowledged that "courts and commentators have criticized the scarcity rationale since its inception." 512 U.S. at 638 & n.5 (citing courts and commentators). The Court noted, however, that it had "no reason" to revisit the rationale's validity in that case, which involved regulation of *cable*, not *broadcast*, television. *Id.* at 638. Thus, the *Turner* Court simply declined to extend *Red Lion* to cable regulation, while carefully refraining from any endorsement of *Red Lion* even in the broadcast context. *See id.* at 637 ("[T]he rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, *whatever its validity in the cases elaborating it,* does not apply in the context of cable regulation.") (emphasis added); *see also Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 812-13 (1996) (Thomas, J., concurring in the judgment in part and

dissenting in part) (noting that "[t]he text of the First Amendment makes no distinctions among print, broadcast, and cable media, but we have done so" despite the fact that such distinctions were "dubious from their infancy.").

The *Turner* Court specifically rejected the government's attempt to recast *Red Lion* as resting on a theory of "market dysfunction" independent of the physical characteristics of the broadcast medium. 512 U.S. at 639. To the extent that *Red Lion* could be so read, the Court held, it was no longer good law. "The justification for our distinct approach to broadcast regulation rests upon the unique *physical* limitations of the broadcast medium." *Id.* at 537 (emphasis added); *see also id.* at 640 ("[T]he special physical characteristics of broadcast transmission, not the economic characteristics of the broadcast market, are what underlies our broadcast jurisprudence.").

Most recently, in *Reno v. ACLU*, 521 U.S. 844 (1997), this Court refused to extend *Red Lion*'s deferential standard of judicial review of broadcast regulation to the Internet. Again, the Court had no occasion in that case to consider the ongoing validity of the scarcity doctrine in the broadcast context, but emphasized that it would not extend that doctrine beyond that arena. *See id.* at 868.

Thus, it is fair to say, as has Judge Edwards of the D.C. Circuit, that "[a]lthough the Supreme Court has not declared the distinction between broadcast and other media a dead one, it has not lately given the distinction an enthusiastic endorsement. In fact, in recent years the Court has only grudgingly upheld the distinction." *Action for Children's Television v. FCC*, 58 F.3d 654, 674 (D.C. Cir. 1995) ("*ACT*") (*en banc*) (Edwards, C.J., dissenting).

B. The Lower Courts Have Criticized *Red Lion*'s Scarcity Doctrine, But Are Powerless To Jettison It.

Although this Court has not had the opportunity to reconsider the ongoing validity of the broadcast scarcity doctrine over the past generation, that issue has arisen with regularity in the lower courts—particularly the D.C. Circuit, where broadcast regulation is most often reviewed. And with regularity, the judges of the D.C. Circuit and other lower courts, from across the jurisprudential spectrum, have heaped criticism on the doctrine, noting in particular that it does not reflect the reality of the modern media world. By the same token, however, the lower courts (like the court below) have concluded that they are constrained to continue applying the doctrine unless and until this Court reconsiders *Red Lion*.

An early judicial critic of the scarcity doctrine was Judge Bork. Almost twenty years ago, he wrote:

> [T]he line drawn between the print media and the broadcast media, resting as it does on the physical scarcity of the latter, is a distinction without a difference. Employing the scarcity concept as an analytic[al] tool ... inevitably leads to strained reasoning and artificial results. ... It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media. All economic goods are scarce, not least the newsprint, ink, delivery trucks, computers, and other resources that go into the production and dissemination of print journalism. Not everyone who wishes to publish a newspaper, or even a pamphlet, may do so. Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. The attempt to use a universal

> fact as a distinguishing principle necessarily leads to analytical confusion.

Telecommunications Research & Action Ctr. v. FCC, 801 F.2d 501, 508 (D.C. Cir. 1986) ("*TRAC*"). Indeed, as Judge Bork noted for the *TRAC* Court, there is irony in this situation, because "[i]t appears that currently the number of broadcast stations ... rivals and perhaps surpasses the number of newspapers and magazines in which political messages may effectively be carried," and "many markets have a far greater number of broadcasting stations than newspapers." *Id.* at 508 n.4 (internal quotation omitted); *see also Loveday v. FCC*, 707 F.2d 1443, 1458-59 (D.C. Cir. 1983) (Bork, J.) (same).

Perhaps the most comprehensive critique of *Red Lion* to emerge from the D.C. Circuit, however, came from Judge Edwards, not generally noted for marching in lockstep with Judge Bork. Almost a decade ago, then-Chief Judge Edwards declared that "[i]n my view, it is no longer responsible for courts to apply a reduced level of First Amendment protection for regulations imposed on broadcast based on an indefensible notion of spectrum scarcity," and dissented from an *en banc* decision applying rationality review under *Red Lion* to broadcast regulation. *ACT*, 58 F.3d at 675 (Edwards, C.J., dissenting). As Judge Edwards explained:

> For years, scholars have argued that the scarcity of the broadcast spectrum is neither an accurate technological description of the spectrum, nor a 'unique characteristic' that should make any difference in terms of First Amendment protection. First, in response to the problem of broadcast interference when multiple broadcasters attempt to transmit on the same frequency, critics point out that this problem does not distinguish broadcasting from print and is easily remedied with a system of administrative licensing or private property rights. Another problem alluded to by the

> Court in *Red Lion* is the claim that the spectrum is inherently limited, in contrast to cable stations or newsprint. Today, however, the nation enjoys a proliferation of broadcast stations, and should the country decide to increase the number of channels, it need only devote more resources toward the development of the electromagnetic spectrum.

Id. (footnotes omitted). "In short, neither technological nor economic scarcity distinguish broadcast from other media." *Id.* at 676. Thus, relying on the scarcity rationale to justify rational basis review of broadcast regulations "makes no sense now," and "[i]t is time to revisit this rationale." *Id.* at 673, 675.

Other prominent judges, both on the D.C. Circuit and elsewhere, have pointedly noted and/or echoed this criticism. Judge Williams, joined by then-Chief Judge Edwards and Judges Silberman, Ginsburg, and Sentelle, declared that the "intense criticism" of *Red Lion* stems partly from "the perception that the 'scarcity' rationale never made sense—in either its generic form (the idea that an excess of demand over supply at a price of zero justifies a unique First Amendment regime) or its special form (that broadcast channels are peculiarly rare)"—and partly from "the growing number of available broadcast channels." *Time Warner Entm't Co. v. FCC*, 105 F.3d 723, 724 n.2 (D.C. Cir. 1997) (opinion dissenting from denial of rehearing *en banc*); *see also Tribune Co. v. FCC*, 133 F.3d 61, 68 (D.C. Cir. 1998) (noting "persuasive evidence that the scarcity rationale is no longer tenable"). Similarly, then-Chief Judge Arnold of the Eighth Circuit noted over a decade ago that "[i]n my opinion, there is a good chance that the legal landscape has changed enough since [*Red Lion*] to produce a different result." *Arkansas AFL-CIO v. FCC*, 11 F.3d 1430, 1443 (8th Cir. 1993) (*en banc*) (Arnold, C.J., concurring).

Unless and until this Court grants *certiorari* to reconsider *Red Lion*, however, the lower courts are constrained to continue

applying the scarcity doctrine, even as they reject its premise. As this Court has emphasized time and again, "it is this Court's prerogative alone to overrule one of its precedents," even if its reasoning has been rendered untenable. *Khan*, 522 U.S. at 20; *see also Hohn v. United States*, 524 U.S. 236, 252-53 (1998); *Agostini v. Felton*, 521 U.S. 203, 237-38 (1997); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

This point has not been lost on the lower courts—including the court below, *see* App. 46-47a—which dutifully (although often grudgingly) note that they have no choice but to continue applying the scarcity doctrine until this Court revisits *Red Lion*. As Judge Silberman colorfully put it for the D.C. Circuit, "[w]e are stuck with the scarcity doctrine until the day that the Supreme Court tells us that the *Red Lion* no longer rules the broadcast jungle." *Tribune*, 133 F.3d at 69; *see also Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1046 (D.C. Cir. 2002) ("[T]his court is not in a position to reject the scarcity rationale even if we agree that it no longer makes sense."); *Radio-Television News Dirs. Ass'n v. FCC*, 184 F.3d 872, 877 n.3 (D.C. Cir. 1999) ("Although *Red Lion* has been the subject of intense criticism, it is still binding precedent.") (internal quotation omitted); *Arkansas AFL-CIO*, 11 F.3d at 1443 (Arnold, C.J., concurring) ("Whether the Supreme Court reexamines *Red Lion* is its business, not ours."); *Branch v. FCC*, 824 F.2d 37, 50 (D.C. Cir. 1987) (Bork, J.) ("[U]nless the [Supreme] Court itself were to overrule *Red Lion*, we remain bound by it.").

Given our hierarchical judicial system, this Court has not only the opportunity but the responsibility to reconsider *Red Lion* and the scarcity doctrine, and this case presents a perfect vehicle. Media General has dutifully raised this issue at every step along the way, and was specifically rebuffed by the Commission and the Third Circuit, both of which held that the challenged cross-ownership restrictions were subject only to

rationality review under *NCCB*. *See* App. 46-48a; 215-18a. The Commission thus made no effort to tailor its cross-ownership restrictions to meet heightened scrutiny, and the Third Circuit did not suggest that those restrictions could satisfy such scrutiny. That is no oversight: the cross-ownership restrictions are based on pure speculation about the link between ownership and diversity, and such speculation cannot remotely satisfy heightened judicial scrutiny.

C. The Time Has Come For This Court To Jettison The Scarcity Doctrine.

The time thus has come for this Court to jettison the scarcity doctrine. The broadcast medium is one of the most important sources of information and expression in our Nation, and the notion that government regulation of this vital medium is subject only to deferential rationality review (as if it were not subject to the First Amendment at all, but were simply run-of-the-mill economic regulation) is perverse. That point is particularly true in light of the communications revolution of the past generation. Not only has the broadcast spectrum itself expanded, but the line between broadcast and other video delivery systems has eroded. For instance, most Americans now view broadcast television channels via cable or satellite systems, *see Turner*, 512 U.S. at 633, App. 276-77a, and more Americans now watch cable and satellite channels than broadcast channels, *see* App. 284-86a. Given that most Americans probably would not know or care whether a particular television channel is transmitted by broadcast or some other video technology, it simply makes no sense to subject government regulation of broadcasting to a lesser degree of judicial scrutiny than government regulation of cable and other services. *See Turner*, 512 U.S. at 627 (noting "the increasing convergence between cable and other electronic media"); *cf. Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 76 (D.C. Cir. 1972) (Bazelon, C.J., dissenting)

(predicting that development of cable would "do away with technical scarcity" with respect to broadcasting).

Indeed, as noted above, this Court expressly premised the scarcity doctrine in *Red Lion* on the then-current state of technology, and did not remotely suggest that the doctrine should forever remain chiseled into constitutional law. In *Red Lion* and since, this Court has recognized the link between technology and the law in this area, and the need to keep the latter in line with the former. *See, e.g., CBS, Inc. v. DNC*, 412 U.S. 94, 102 (1973) (noting that "the broadcast industry is dynamic in terms of technological change," and that "solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence"); *see also id.* at 158 n.8 (Douglas, J., concurring in judgment) ("Scarcity may soon be a constraint of the past, thus obviating the concerns expressed in *Red Lion*. It has been predicted that it may be possible within 10 years to provide television viewers 400 channels through the advances of cable television."); *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 777 (1996) (Souter, J., concurring) ("[B]ecause we know that changes in ... regulated technologies will enormously alter the structure of regulation itself, we should be shy about saying the final word today about what will be accepted as reasonable tomorrow.").

Perhaps the most stinging, and telling, critique of the scarcity doctrine has come from none other than the FCC itself. Over a decade ago, the Commission jettisoned the fairness doctrine, and in so doing repudiated the scarcity doctrine. *See In re Compl. of Syracuse Peace Council*, 2 F.C.C.R. 5043 (1987), *pet. for review denied*, 867 F.2d 654 (D.C. Cir. 1989). The Commission in that case specifically responded to this Court's invitation in *League of Women Voters* for a "signal" that it was time to reconsider the scarcity doctrine, 468 U.S. 376 n.11: "[I]n response to the question raised by the Supreme Court in *League of Women Voters*, we believe that the standard applied

in *Red Lion* should be reconsidered and that the constitutional principles applicable to the printed press should be equally applicable to the electronic press." 2 F.C.C.R. at 5053.

As the Commission explained, "the dramatic transformation in the telecommunications marketplace provides a basis for the Court to reconsider its application of diminished First Amendment protection to the electronic media." *Id.* at 5058; *see also id.* at 5048 ("[T]he extraordinary technological advances that have been made in the electronic media since the 1969 *Red Lion* decision, together with a consideration of fundamental First Amendment principles, provide an ample basis for the Supreme Court to reconsider the premise or approach of its decision in *Red Lion*."). In particular, the Commission noted that the number of broadcast television and radio stations had increased dramatically since *Red Lion*, and that "the advent and increased availability of such other technologies as cable and satellite television services have dramatically enhanced ... access" to "a multiplicity of media outlets." *Id.* at 5051. Thus, the Commission concluded, "[w]e simply believe that, in analyzing the appropriate First Amendment standard to be applied to the electronic press, the concept of scarcity—be it spectrum or numerical—is irrelevant," and "the scarcity rationale developed in the *Red Lion* decision and successive cases no longer justifies a different standard of First Amendment review for the electronic press." *Id.* at 5053, 5055; *see also id.* at 5054 ("We do not believe that any scarcity rationale justifies differential First Amendment treatment of the print and broadcast media.").

Nearly eighteen years later, needless to say, these points apply with even greater force. Convergence and diversity, not scarcity, are the hallmarks of the American media landscape, so that continuing to base constitutional analysis in this area on a scarcity premise is untenable. As the current FCC Chairman has observed, "[t]he long and the short of it is this: as matters now stand, the Commission has unequivocally repudiated

spectrum scarcity as a factual matter." Joint Statement of Commissioners Powell & Furchtgott-Roth, *Personal Attack & Political Editorial Rules*, 13 F.C.C.R. 21,929, 21,940 (1998).[1] The FCC recognized as much in the order under review, emphasizing that "[t]he average American has a far richer and more varied range of media voices from which to choose today than at any time in history." App. 463a (citing "growth in available media outlets"); *see also* App. 465a ("[T]he types of media and the number of outlets within each media, except daily newspapers, have increased dramatically in the past twenty years."). Indeed, the FCC determined below that the newspaper/broadcast cross-ownership ban upheld in *NCCB* "actually works to inhibit [local news and information] programming," and prevents the efficiencies and increased quality of programming that results from "combining a newspaper's local news-gathering resources with a broadcast platform." App. 442a, 445-48a. Thus, "the question confronting media companies today is not whether they will be able to dominate the distribution of news and information in any market, but whether they will be able to be heard at all among the cacophony of voices vying for the attention of Americans." App. 464a.

The Third Circuit tried to sidestep this point by asserting that "[t]he abundance of non-broadcast media does not render the broadcast spectrum any less scarce." App. 47a. That assertion, however, misses the point on two levels.

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[1] The current FCC Chairman also announced (more than six years ago) that "the 'time has come to reexamine First Amendment jurisprudence as it has been applied to broadcast media and bring it into line with the realities of today's communications marketplace.'" *Sinclair*, 284 F.3d at 172 (Sentelle, J., dissenting) (quoting then-Commissioner Powell, *Willful Denial & First Amendment Jurisprudence*, Remarks Before the Media Institute, Washington, D.C. (Apr. 22, 1998), available at http://www.fcc.gov/Speeches/Powell/spmkp808.html). As Judge Sentelle observed, "[p]erhaps with [this] announcement ... the Supreme Court will take notice." *Id.*

On the first level, the broadcast spectrum itself is not characterized by static "scarcity." To the contrary, technological advances have increased the amount of broadcast spectrum available for use, and have allowed more intense and efficient use of that spectrum. *See, e.g., Syracuse Peace Council*, 2 F.C.C.R. at 5052-55; Christopher S. Yoo, *The Rise & Demise of the Technology-Specific Approach to the First Amendment*, 91 Geo. L.J. 245, 279-81 (2003) ("[T]echnological progress has steadily expanded the range of the electromagnetic spectrum available for commercial use."); *ACT*, 58 F.3d at 675 (Edwards, C.J., dissenting) ("[T]he nation enjoys a proliferation of broadcast stations, and should the country decide to increase the number of channels, it need only devote more resources toward the development of the electromagnetic spectrum.").[2]

On the second (and even more fundamental) level, it makes no sense to focus on broadcasting in isolation. Broadcast scarcity was relevant in *Red Lion* and *NCCB* only because the limited number of frequencies then available restricted the number of voices that could be heard on what were then the only major media of mass communication. Technological convergence has rendered obsolete the boundaries between media outlets, and broadcasters no longer are the sole or even the dominant providers of video programming. As noted above, most Americans do not even receive their broadcast programming for free through reception of over-the-air signals, but instead through subscription services such as cable and satellite systems. *See* App. 284-88a; Yoo, *supra*, at 279-80 & nn.177-79. In addition, it is now not only possible, but

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[2] Indeed, as one commentator has observed, the scarcity of broadcast frequencies at the time of *Red Lion* was a result of a series of regulatory decisions limiting the amount of spectrum allocated to broadcasting, combined with the government's decision to give away new licenses and renew existing licenses for free. *See* Yoo, *supra*, at 269-80. *Red Lion* in effect accepted the FCC's existing broadcast regulations as the "constitutional baseline" for reviewing whether additional regulations violated the First Amendment. *Id.*

increasingly common, to watch television or listen to the radio over the Internet. *See In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 19 F.C.C.R. 1606, 1673-75 (2004). To talk of broadcast "scarcity" under these circumstances thus misses the point. The current abundance of alternative outlets undermines the once-pivotal role of the broadcast spectrum in providing access to different voices.

In short, the newspaper/broadcast cross-ownership restrictions at issue should be subjected to heightened judicial scrutiny under the First Amendment, and, because they cannot remotely satisfy such scrutiny, should be invalidated.

II. This Court Should Reconsider Its Ruling In *NCCB* That The First Amendment And The Equal Protection Component Of The Fifth Amendment Require Only Deferential Review Of Cross-Ownership Restrictions Targeted At A Single Non-Broadcast Medium, Newspapers.

The sweeping changes in the communications sphere over the past generation should lead this Court to reconsider not only the scarcity doctrine, but also *NCCB*'s separate and independent holding that the differential treatment of newspapers in the cross-ownership regime does not trigger heightened judicial scrutiny. Under settled law, government restrictions that single out the press, or any element thereof (like newspapers), for differential treatment are subject to heightened judicial scrutiny under both the First Amendment and the equal protection component of the Fifth Amendment. *See, e.g., Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987) (citing cases); *cf. Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (holding that Due Process Clause of Fifth Amendment includes component analogous to Equal Protection Clause of Fourteenth Amendment). Newspapers are now the *only* non-broadcast medium subject to broadcast cross-ownership restrictions.

Thus, for example, a cable company may buy a broadcast station even where a newspaper may not.

In *NCCB*, however, this Court rejected a constitutional challenge to the FCC's newspaper/broadcast cross-ownership ban on just this ground. The newspaper owners there argued that the ban "unfairly 'singled out' newspaper owners for more stringent treatment than other license applicants." 436 U.S. at 801 & n.19. The *NCCB* Court disagreed, holding that the ban "treat[ed] newspaper owners in essentially the same fashion as other owners of the major media of mass communications." *Id.* at 801. Because, in *NCCB*'s day, the only other "major media of mass communications" besides newspapers were broadcast television and radio, applying a broadcast ownership ban to the single non-broadcast medium of newspapers did not unfairly single out that medium, since similar prohibitions applied to owners of radio and television stations.

In light of the communications revolution described above, that holding is no longer tenable. Although newspapers are singled out as the only non-broadcast medium subject to a broadcast cross-ownership ban, it is no longer true that newspapers are the only non-broadcast "major medi[um] of mass communications." *NCCB*, 436 U.S. at 801. The major media outlets of today include not only cable television, but also the Internet and multichannel video program distributors like satellite and microwave services—none of which is subject to the FCC's continued restrictions on broadcast cross-ownership.

The Third Circuit, however, refused to entertain this argument, holding that it was "foreclosed" by *NCCB*. App. 45a. Because *NCCB* "endorsed the constitutionality of the 1975 newspaper/television cross-ownership ban," *id.*, the court asserted, "changing times" did not justify revisiting *NCCB*, notwithstanding the emergence of new mass media. App. 46a. As with respect to the scarcity doctrine, the court simply

declared that "it is the Supreme Court's prerogative to change its own precedent." *Id.* (citing *Khan*, 522 U.S. at 20).

As with respect to the scarcity doctrine, accordingly, Media General respectfully requests this Court to reconsider *NCCB*'s holding on this point. Again, absent reconsideration by this Court, *NCCB*'s outdated holding will remain chiseled into constitutional law notwithstanding the manifest erosion of *NCCB*'s factual premises. Even if *Red Lion* remained the law and the government had a virtually free hand to regulate broadcast media, it simply makes no sense, and should trigger heightened judicial scrutiny, for the government to subject newspapers to restrictions that are not generally imposed on other non-broadcast media. "[L]aws that single out the press, or certain elements thereof, for special treatment 'pose a particular danger of abuse by the State,' and so are always subject to at least some degree of heightened First Amendment scrutiny." *Turner*, 512 U.S. at 640-41 (quoting *Ragland*, 481 U.S. at 228); *see also Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936). "[D]ifferential treatment ... suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983).

Indeed, the FCC's restrictions treat newspapers even more unfavorably than radio and television broadcast stations: in mid-size markets, a broadcaster may own up to two broadcast television stations, but a newspaper owner may not. *See* App. 530-31a. And a broadcaster can acquire as many radio stations in one market as authorized by the local radio cap rule, but a newspaper owner may acquire only half that number, if it also owns a television station. *See id.* The FCC's discriminatory treatment of newspapers thus cannot remotely satisfy heightened constitutional scrutiny, and accordingly this Court should invalidate those restrictions.

III. This Court Should Reconsider Its Ruling In *NCCB* That Restrictions On Broadcast Ownership Specifically Directed At Promoting Diversity Are Content Neutral, And Thus Trigger Only Deferential Review Under The First Amendment.

Finally, separate and independent from the two grounds set forth above, the FCC's newspaper/broadcast cross-ownership restrictions should be subject to heightened judicial scrutiny for the simple reason that they are content-based. The whole *point* of those restrictions, after all, is to enhance "diversity" in broadcasting. *See* App. 225a ("[R]egulating ownership is an appropriate means to promote viewpoint diversity."); App. 453a ("[W]e continue to believe that diversity of ownership can advance our goal of diversity of viewpoint."). Because this objective necessarily relates to the *content* of the relevant speech, the restrictions are not "justified without reference to the content of the regulated speech," and are hence content-based. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *see also Turner*, 512 U.S. at 658 (regulation content-based if "concerned with the communicative impact of the regulated speech"). And, under settled law, government restrictions based on the content of speech—no matter how benign their motivation—are subject to heightened First Amendment scrutiny. *See, e.g., Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991); *Ragland*, 481 U.S. at 228. Such scrutiny is particularly appropriate with respect to the cross-ownership restrictions, because there is no evidence that the content-based rationale of those restrictions is even effective in promoting a "diversity" of broadcast voices in the first place.

Again, however, this Court rejected that very point in *NCCB*. While specifically acknowledging that the premise of the newspaper/broadcast cross-ownership ban was to "enhance the possibility of achieving greater diversity of viewpoints," 436 U.S. at 796, the Court simply asserted—without

explanation—that the ban was "not content related," *id.* at 801. Not surprisingly, thus, Media General met with no success below in arguing that the cross-ownership restrictions at issue here are necessarily content related, and subject to heightened judicial scrutiny based on that ground alone. *See* App. 218a; *see also Sinclair*, 284 F.3d at 172 (Sentelle, J., dissenting) ("While there may be merit to petitioner's argument that the 'diversity' rationale is essentially content-based, and that therefore heightened scrutiny should be implicated, that argument has been rejected.") (citing *NCCB*, 436 U.S. at 799-800, and *Red Lion*, 395 U.S. at 389-91).

Because this Court conclusively resolved this issue in *NCCB*, once again it falls to this Court to remedy the situation. The *NCCB* Court appears to have blurred the line between *content* and *viewpoint* neutrality. While the newspaper/broadcast cross-ownership restrictions may not be targeted at the viewpoint of speech, that does not mean that they are not targeted at the content of speech, and does not immunize them from heightened scrutiny. *See, e.g., Consolidated Edison Co. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 537 (1980) ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular *viewpoints*, but" also to regulations seeking "to restrict expression because of its message, its ideas, *its subject matter, or its content.*") (emphasis added; internal quotation omitted).

That point is entirely consistent with this Court's decision in *Turner*. That case involved the constitutionality of the FCC's "must carry" rules, which require cable owners to carry local broadcast station programming. The argument was made there that these rules were content-based because the government was forcing cable operators to transmit broadcast speech. The Court rejected that argument, holding that the rules were justified without reference to the content of the speech, but instead by reference to the structural need to protect the broadcast industry, and hence "to ensure that all Americans, especially those unable

to subscribe to cable, have access to free television programming—whatever its content." 512 U.S. at 641-52; *see also id.* at 652 ("[T]he must-carry provisions are not designed to favor or disadvantage speech of any particular content. Rather, they are meant to protect broadcast television from what Congress determined to be unfair competition by cable systems.").

In contrast, the newspaper/broadcast cross-ownership restrictions at issue here *are* specifically designed to affect the content of speech by promoting "diversity." The key point about *Turner* for present purposes, thus, is that four Members of this Court specifically determined that an interest in promoting "diversity" is content based. *See Turner*, 512 U.S. at 678 (O'Connor, J., joined by Scalia, Thomas, and Ginsburg, JJ., dissenting). "Preferences for diversity of viewpoints," the dissent noted, necessarily "make reference to content." *Id.* at 677. "They may not reflect hostility to particular points of view, or a desire to suppress certain subjects because they are controversial or offensive. They may be quite benignly motivated. But benign motivation, we have consistently held, is not enough to avoid the need for strict scrutiny of content-based justifications." *Id.*; *see also id.* at 678 ("The interest in ensuring access to a multiplicity of diverse and antagonistic sources of information, no matter how praiseworthy, is directly tied to the content of what the speakers will likely say.").

Indeed, the justification for the newspaper/broadcast cross-ownership restrictions has an Orwellian ring. Limiting the speech of some to enhance the speech of others is fundamentally antithetical to the First Amendment. *See, e.g., First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791 n.30 (1978) (rejecting, as inconsistent with "basic tenets of First Amendment jurisprudence," the notion that the government "may control the volume of expression by the wealthier, more powerful corporate members of the press in order to enhance the relative voices of smaller and less influential members.")

(internal quotation omitted); *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (*per curiam*) (emphasizing that the "government may [not] restrict the speech of some elements of our society in order to enhance the relative voice of others"). The restrictions' egalitarian objectives do not diminish their sting: regardless of whether the wolf is dressed in sheep's clothing, it is still a wolf. *See, e.g.*, Kathleen M. Sullivan, *Free Speech and Unfree Markets*, 42 U.C.L.A. L. Rev. 949, 957 (1995) (warning that "new speech regulators have argued in effect that speech regulation should correct for 'market failures,' break up speech 'monopolies,' redistribute relative 'speaking power,' or protect us from our existing speech 'preferences' or 'tastes.'"). The First Amendment, after all, "rests on the premise that it is government power, rather than private power, that is the main threat to free expression." *Turner*, 512 U.S. at 685 (dissenting opinion).

Because the FCC's newspaper/broadcast cross-ownership restrictions are content based, they should be subject to heightened scrutiny under the First Amendment *regardless* of whether *Red Lion*'s "scarcity" doctrine remains the law of the land. Even under the *Red Lion* regime, a content-based restriction is subject to heightened judicial scrutiny. *See League of Women Voters*, 468 U.S. 364. There, this Court struck down a statute prohibiting broadcasters from "expressi[ng] editorial opinion[s] on controversial issues of public importance," in part because "the scope of [the] ban [was] defined solely on the basis of the content of the suppressed speech." *Id.* at 381 (internal quotation omitted), 383. *League of Women Voters* thus underscores that not *all* broadcast regulation is subject to deferential review, and that "[t]he First Amendment's hostility to content-based regulation" requires the Court to be "particularly wary" in reviewing a content-based regulation of broadcasting. *Id.* at 384 (internal quotation omitted).

Because *NCCB*'s cursory and unexplained holding that newspaper/broadcast restrictions are "not content related" cannot be squared with this Court's other precedents, but will remain the law of the land absent action by this Court, this Court should reconsider that holding. And because the avowedly content-based restrictions here cannot remotely satisfy heightened judicial scrutiny, this Court should invalidate those restrictions.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of *certiorari*.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 03-3388, 03-3577, 03-3578, 03-3579, 03-3580, 03-3581, 03-3582, 03-3651, 03-3665, 03-3675, 03-3708, 03-3894, 03-3950, 03-3951, 03-4072, 03-4073 & 04-1956

PROMETHEUS RADIO PROJECT

vs.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA

Prometheus Radio Project, Petitioner in No. 03-3388, Media General, Inc., Petitioner in No. 03-3577, National Association of Broadcasters, Petitioner in No. 03-3578, Network Affiliated Stations Alliance, ABC Television Affiliates Association, CBS Television Affiliates Association and NBC Television Affiliates, Petitioners in No. 03-3579, Fox Entertainment Group, Inc. and Fox Television Stations, Inc., Petitioners in No. 03-3580, Viacom Inc., Petitioner in No. 03-3581, National Broadcasting Company, Inc., and Telemundo Communications Group, Inc., Petitioners in No. 03-3582, Sinclair Broadcast Group, Inc., Petitioner in No. 03-3651, Media Alliance, Petitioner in No. 03-3665 Paxson Communications Corporation, Petitioner in No. 03-3675, National Council of the Churches of Christ in the United States, Petitioner in No. 03-3708, Tribune Company, Petitioner in No. 03-3894, Paxson Communications Corporation, Petitioner in No. 03-3950, Emmis Communications Corporation, Petitioner in No. 03-3951, Center for Digital Democracy and Fairness & Accuracy in Reporting, Petitioners in No. 03-4072, Clear Channel Communications, Petitioner in No. 03-4073, American Hispanic Owned Radio Association, Civil Rights Forum on Communications Policy, League of United Latin American

Citizens, Minority Business Enterprise Legal Defense and Education Fund, Minority Media and Telecommunications Council, National Asian American Telecommunications Association, National Association of Latino Independent Producers, National Coalition of Hispanic Organizations, National Council of La Raza, National Hispanic Media Coalition, National Indian Telecommunications Institute, National Urban League, Native American Public Telecommunications, Inc., PRLDEF-Institute for Puerto Rican Policy, UNITY: Journalists of Color, Inc. and Women's Institute for Freedom of the Press, Petitioners in No. 04-1956

On Petition for Review of An Order of
the Federal Communications Commission
(FCC No. 03-127)

Argued February 11, 2004

Before: SCIRICA, Chief Judge, AMBRO and FUENTES, Circuit Judges

(Filed June 24, 2004)

OPINION OF THE COURT

Table of Contents

I. Background .....[12a]

A. The 1934 Communications Act and Early Broadcast Ownership Regulation .....[12a]

B. Deregulation Initiatives.....[14a]

C. The Telecommunications Act of 1996.....[15a]

D. Regulatory Review Since 1996.....[16a]

E. The Commission's 2003 Report and Order .....[18a]

F. The Order's Modification of Broadcast Media Ownership Rules.....[19a]

1. Local Television Ownership.....[19a]

2. Local Radio Ownership .....[20a]

5. National Television Ownership .....[22a]

6. Dual Network Rule .....[22a]

G. Procedural History of the Current Appeals.....[23a]

H. Subsequent Legislation .....[23a]

II. Jurisdiction and Standard of Review .....[24a]

A. Standard of Review Under the Administrative Procedure Act .....[24a]

B. Standard of Review Considerations Under Section 202(h).....[26a]

1. "Determine whether any such rules are necessary in the public interest." .....[28a]

2. "Repeal or modify any regulations it determines to be no longer in the public interest." .....[33a]

C. Conclusion .....[35a]

III. Mootness and the National Television Ownership Rule .....[36a]

IV. Cross-Ownership Rules .....[38a]

A. Regulatory Background and the 2002 Biennial Review .....[39a]

B. The Commission's decision not to retain a ban on newspaper/broadcast cross-ownership is justified under § 202(h) and is supported by record evidence. .....[40a]

1. Newspaper/broadcast combinations can promote localism.....[40a]

2. A blanket prohibition on newspaper/broadcast combinations is not necessary to protect diversity.....[42a]

C. The Commission's decision to retain some limits on common ownership of different-type media outlets was constitutional and did not violate § 202(h).....[44a]

1. Continuing to regulate cross-media ownership is in the public interest. .....[44a]

2. Continuing to regulate cross-media ownership does not violate the Fifth Amendment. .....[45a]

3. Continuing to regulate cross-media ownership does not violate the First Amendment. .....[46a]

D. The Commission did not provide reasoned analysis to support the specific Cross-Media Limits that it chose.....[48a]

1. Overview of the Commission's Diversity Index Methodology .....[49a]

2. The Commission did not justify its choice and weight of specific media outlets. .....[52a]

3. The Commission did not justify its assumption of equal market shares. .....[58a]

4. The Commission did not rationally derive its Cross-Media Limits from the Diversity Index results. .....[61a]

5. The Commission should provide better notice on remand.....[64a]

V. Local Television Ownership Rule .....[66a]

A. Regulatory Background and the 2002 Biennial Review .....[66a]

B. We uphold several threshold challenges to the Commission's overall regulatory approach. .....[68a]

1. Limiting local television station ownership is not duplicative of antitrust regulation. .....[68a]

2. Media other than broadcast television may contribute to viewpoint diversity in local markets. ....[70a]

3. Consolidation can improve local programming.[71a]

4. The Commission adequately noticed its decision to allow triopolies. ....[72a]

C. We uphold the Commission's decision to retain the top-four restriction. ....[72a]

D. We remand the specific numerical limits for the Commission's further consideration. ....[76a]

E. We remand the Commission's repeal of the Failed Station Solicitation Rule. ....[80a]

VI. Local Radio Ownership Rule....[82a]

A. Regulatory Background and the 2002 Biennial Review ....[82a]

B. We uphold the Commission's new definition of local markets. ....[85a]

1. The Commission justified using Arbitron Metro markets. ....[85a]

2. The Commission justified including noncommercial stations. ....[90a]

C. We uphold the Commission's transfer restriction.[91a]

1. Transfer restriction is "in the public interest."[92a]

2. Transfer restriction is reasoned decisionmaking.[93a]

3. Transfer restriction is constitutional. .....[94a]

D. We affirm the attribution of Joint Sales Agreements. .....[96a]

1. Attribution of JSAs is "necessary in the public interest." .....[97a]

2. Attribution of JSAs is reasoned decisionmaking. .....[97a]

3. Attribution of JSAs is constitutional. .....[98a]

E. We remand the numerical limits to the Commission for further justification.....[99a]

1. The Commission's numerical limits approach is rational and in the public interest.....[101a]

2. The Commission did not support its decision to retain the existing numerical limits with reasoned analysis. .....[102a]

a. The Commission did not sufficiently justified "five equal-sized competitors" as the right benchmark. .....[102a]

b. The Commission did not sufficiently justified that the existing numerical limits actually ensure that markets will have five equal-sized competitors.....[104a]

c. The Commission did not support its decision to retain the AM/FM subcaps.[106a]

VII. Conclusion .....[107a]

SCIRICA, *dissenting in part*

I. Introduction.....[108a]

II. Standard of Review.....[116a]

A. .....[116a]

B. .....[118a]

III. Rules at Issue in this Appeal and Agency Rationale for Rules .....[125a]

A. Policy Goals and Media Landscape.....[126a]

1. Policy Goals of the Present Order.....[127a]

2. New Media Landscape and the Growth of the Internet .....[130a]

B. Ownership Rules.....[132a]

1. Cross-Ownership Rules .....[132a]

a. History of Cross-Ownership Regulation[132a]

b. Repeal of Newspaper Broadcast Cross-Ownership Prohibition .....[135a]

c. Cross-Media Limits.....[137a]

2. Local Television Ownership Rule .....[144a]

3. Local Radio Ownership Rule.....[148a]

IV. Engaging Flaws Found by the Majority .....[159a]

A. Cross-Ownership Rule and the Diversity Index[159a]

1. Weight Attributed to the Internet.....[160a]

2. Equal Market Shares Within Media Type in the Diversity Index.....[169a]

3. Deriving the Cross Media Limits from the Diversity Index.....[173a]

4. Notice.....[177a]

B. Local Television Ownership Rule .....[179a]

C. Local Radio Ownership Rule.....[184a]

V. .....[190a]

AMBRO, *Circuit Judge*

In these consolidated appeals we consider revisions by the Federal Communications Commission to its regulations governing broadcast media ownership that the Commission promulgated following its 2002 biennial review. On July 2, 2003, the Commission announced a comprehensive overhaul of its broadcast media ownership rules. It increased the number of television stations a single entity may own, both locally and nationally; revised various provisions of the regulations governing common ownership of radio stations in the same community; and replaced two existing rules limiting common ownership among newspapers and broadcast stations (the newspaper/broadcast cross-ownership rule and the radio/television cross-ownership rule) with a single set of "Cross-Media Limits." *See Report and Order and Notice of Proposed Rulemaking*, 18 F.C.C.R. 13,620 (2003) (the "Order").

Several public interest and consumer advocacy groups (collectively, the "Citizen Petitioners")[1] petitioned for judicial review of the Order in various courts of appeals,

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[1] For convenience we will use this designation throughout our opinion to refer, jointly or severally, to the petitioners and intervenor who raise anti-deregulatory challenges to the Order, including Prometheus Radio Project, Media Alliance, National Council of the Churches of Christ in the United States, Fairness and Accuracy in Reporting, Center for Digital Democracy, Consumer Union and Consumer Federation of America, Minority Media and Telecommunications Council (representing numerous trade, consumer, professional, and civic organizations concerned with telecommunications policy as it relates to racial minorities and women), and Office of Communication of the United Church of Christ ("UCC") (intervenor).

The Network Affiliated Stations Alliance, representing the CBS Television Network Affiliates Association, the NBC Television Affiliates, and the ABC Television Affiliates, and Capitol Broadcasting Company, Inc. (intervenor) also raised anti-deregulatory challenges to the national television ownership rule (*see infra* Parts I.F.5, III).

contending that its deregulatory provisions contravened the Commission's statutory mandates as well as the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (the "APA"). Associations of networks, broadcasters, and newspaper owners[2] also challenged the Order, arguing that pro-regulatory revisions as well as the absence of further deregulation violate the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "1996 Act"), the APA, and the United States Constitution. The Judicial Panel on Multidistrict Litigation, acting pursuant to the random selection procedures of 28 U.S.C. § 2112(a), consolidated the petitions in this Court. On September 3, 2003, we stayed implementation of the rules pending our review.

For the reasons stated below, we affirm the power of the Commission to regulate media ownership. In doing so, we reject the contention that the Constitution or § 202(h) of the 1996 Act somehow provides rigid limits on the Commission's ability to regulate in the public interest. But we must remand certain aspects of the Commission's Order that are not adequately supported by the record. Most importantly, the Commission has not sufficiently justified its particular chosen numerical limits for local television

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[2] Rather than identifying these petitioners and intervenors individually when discussing their positions throughout this opinion, we refer to them collectively as the "Deregulatory Petitioners." They include: Clear Channel Communications, Inc.; Emmis Communications Corporation; Fox Entertainment Group, Inc.; Fox Television Stations, Inc.; Media General Inc.; National Association of Broadcasters; National Broadcasting Company, Inc.; Paxson Communications Corporation; Sinclair Broadcast Group; Telemundo Communications Group, Inc.; Tribune Company; Viacom Inc.; Belo Corporation (intervenor); Gannett Corporation (intervenor); Morris Communications Company (intervenor); Millcreek Broadcasting LLC (intervenor); Nassau Broadcasting Holdings (intervenor); Nassau Broadcasting II, LLC (intervenor); Newspaper Association of America (intervenor); and Univision Communications, Inc. (intervenor).

ownership, local radio ownership, and cross-ownership of media within local markets. Accordingly, we partially remand the Order for the Commission's additional justification or modification, and we partially affirm the Order. The stay will continue pending our review of the Commission's action on remand.[3]

I. Background

A. The 1934 Communications Act and Early Broadcast Ownership Regulation

In 1934 Congress authorized the Commission to grant licenses for private parties' exclusive use of broadcast frequencies. Recognizing that the finite radiofrequency spectrum inherently limits the number of broadcast stations that can operate without interfering with one another, Congress required that broadcast licensees serve the public

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[3] Our dissenting colleague asserts several times (indeed it is a principal theme) that we somehow substitute our own policy judgment for that of the Commission. Our response is simple. It is impossible to substitute our policy judgment for that of the Commission when we have no view on its policies save that it act with reason. The proof for this statement is that we do not reverse, but remand (and only in part).

Differences with our dissenting colleague touch only some of the many issues presented on appeal. He believes that the Commission's work, while in part flawed, comes close enough to merit our approval. Our response: not yet. He believes that any imperfections and failings by the Commission can be rectified at the next quadrennial review without the need for a court-ordered remand. Our response: to do so is to abdicate the role assigned to us (see our standard of review discussion at Part II *infra*), a role, incidentally, our colleague does not deny. What we do is not novel, as it reprises many of the same reasoned analysis concerns expressed by the D.C. Circuit Court of Appeals in *Fox Television Stations v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2003), and *Sinclair Broadcast Group Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002).

The bottom line: the Commission gets another chance to justify its actions. Once that occurs and the case returns to us, we may yet close the loop of agreement with our colleague.

interest, convenience, and necessity. Communications Act of 1934, 47 U.S.C. § 309(a); *see also id.* §§ 307(a), 310(d), 312.

"In setting its licensing policies, the Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power." *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 780 (1978) ("*NCCB*"). The Commission's early regulations reflected its presumption that a single entity holding more than one broadcast license in the same community contravened public interest. *See Genesee Radio Corp.*, 5 F.C.C. 183, 186-87 (1938). In 1941, the Commission announced that it would not license more than one station in the same area to a single network organization. *See Nat'l Broad. Co. v. United States*, 319 U.S. 190, 206-08, 224-27 (1943) (upholding the rule). At the same time, the Commission prohibited common ownership of stations within the same broadcast service (AM radio, FM radio, and television) in the same community. *See Rules Governing Standard and High Frequency Broadcast Stations*, 5 Fed. Reg. 2382, 2384 (June 26, 1940) (FM radio); *Rules Governing Standard and High Frequency Broadcast Stations*, 6 Fed. Reg. 2282, 2284-85 (May 6, 1941) (television); *Rules Governing Standard and High Frequency Broadcast Stations*, 8 Fed. Reg. 16065 (Nov. 27, 1943) (AM radio). Regulations limiting an entity to the common ownership of seven AM radio stations, seven FM radio stations, and seven television stations survived judicial scrutiny in 1956. *See United States v. Storer Broad. Co.*, 351 U.S. 192 (1956). In the 1970s the Commission adopted its first cross-ownership bans, which prohibited, on a prospective basis, the common ownership of television and radio stations serving the same market, as well as combinations of radio or broadcast stations with a daily newspaper in the same community. *Amendment of Sections 73.35, 73.240 and 73.636 of the Commission Rules Relating*

to Multiple Ownership of Standard, FM and Television Broadcast Stations, 22 F.C.C.2d 306, ¶ 5 (1970); *Amendment of Sections 73.34, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, 50 F.C.C.2d 1046 (1975). The Supreme Court upheld the newspaper/broadcast cross-ownership ban as a "reasonable means of promoting the public interest in diversified mass communications." *NCCB*, 436 U.S. at 802.

B. Deregulation Initiatives

The 1980s saw a deregulatory trend for media ownership. The Commission raised its national ownership limits to permit common ownership of 12 stations in each broadcast service (though still prohibiting station combinations that would reach more than 25% of the national audience). *Amendment of Section 73.3555 (formerly 73.35, 73.240, and 73.636) of the Commission's Rules Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations*, 100 F.C.C.2d 74 ¶¶ 38, 39 (1985). The Commission also determined that UHF television stations should not be deemed to have the same audience reach as VHF stations,[4] due to "the inherent physical limitations of [the UHF] medium," and therefore applied a 50% "discount" to UHF audiences as counted under the national audience limitation. *Id.* ¶¶ 42-44. In other words, UHF stations count only half of their audiences in determining compliance with the national television ownership rule.

In 1989 the Commission eased its "one to a market" radio/television cross-ownership rules by allowing waiver

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[4] VHF (Very High Frequency) stations (channels 2 to 13), which broadcast on frequencies between 30 and 300 MHz, can reach households up to 76 miles away. UHF (Ultra High Frequency) stations (channels higher than 13), which broadcast between 300 and 3000 MHz—reach only 44 miles, and, consequently, far fewer non-cable households than VHF stations. *Order* ¶ 586.

requests for radio/television cross-ownership in the 25 largest television markets. The Commission stated that it would look favorably upon requests for waivers where there would be 30 independently owned broadcast "voices" remaining in the market after consolidation. *Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules*, 4 F.C.C.R. 1741, ¶ 1 (1989). In 1992, the Commission relaxed local and national radio ownership restrictions and adopted a tiered approach to radio concentration that allowed a single entity to own more radio stations in the largest markets (up to three AM and three FM stations, subject to a local audience reach limitation of 25% and a national cap of 30 AM stations and 30 FM stations) and fewer in the smallest markets. *Revision of Radio Rules and Policies*, 7 F.C.C.R. 6387, ¶ 27 (1992).

C. The Telecommunications Act of 1996

In 1996 Congress overhauled the Communications Act by enacting the Telecommunications Act of 1996. The 1996 Act contemplated a "pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector development of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." S. Rep. No. 104–230, at 1–2 (1996). The 1996 Act eliminated all limits on national radio ownership and raised the national television audience reach cap from 25% to 35%. 1996 Act §§ 202(a), (c)(1)(B), 110 Stat. at 110–11. Congress also eased local radio ownership limits, establishing a four-tier sliding scale limit of numerical caps that allowed for as many as eight co-owned radio stations in the largest markets. *Id.* § 202(b)(1), 110 Stat. at 110.

The 1996 Act did not contain a new local television rule, but it directed the Commission to "conduct a rulemaking proceeding to determine whether to retain, modify, or eliminate" its existing local television ownership limitations. *Id.* § 202(c)(2), 110 Stat. at 111. It also expanded the

applicability of the one-to-a-market radio/television cross-ownership restriction waiver to the fifty largest markets. *Id.* § 202(d), 110 Stat. at 111.

Finally, the 1996 Act instructed the Commission to review biennially its broadcast ownership rules "to determine whether any of such rules are necessary in the public interest as the result of competition." *Id.* § 202(h), 110 Stat. at 111–12. Section 202(h) also required the Commission to "repeal or modify any regulation it determines to be no longer in the public interest." *Id.*

D. Regulatory Review Since 1996

In 1999 the Commission responded to Congress's directive under § 202(c) of the 1996 Act to review its local television rule and announced that it would relax its prohibition on the common ownership of television stations with overlapping signals. The Commission's new rule would allow two commonly owned television stations (a television station "duopoly") in the same Designated Market Area ("DMA" or "market") as long as (1) neither station was ranked among the four largest ("top-four") stations in the market and (2) eight independently owned stations remained in the market post-merger. *Review of the Commission's Regulations Governing Television Broadcasting*, 14 F.C.C.R. 12,903, ¶ 8 (1999) ("*1999 Television Rule Review*"). In the same rulemaking, the Commission also relaxed the one-to-a-market radio/television cross-ownership restriction and allowed radio/television station combinations to exist within three-tiered limits that depend on the size of the market. *Id.* ¶ 9.[5]

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[5] These limits allowed an entity to own one television station (or two if permitted under the new local television rule) and (1) up to six radio stations in markets where at least 20 independent voices would remain post-merger, (2) up to four radio stations in markets where at least 10

(Continued...)

Meanwhile, in 1998 the Commission began the first biennial review of its broadcast ownership regulations as required under § 202(h). In 2000 it announced that it would retain the national television ownership rule (the 35% limit provided in the 1996 Act) and its cable/broadcast cross-ownership rule after determining that both rules remained "necessary in the public interest." *1998 Biennial Regulatory Review-Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 15 F.C.C.R. 11,058, ¶ 4 (2000) ("*1998 Biennial Regulatory Review*").[6] On appeal, however, the United States Court of Appeals for the D.C. Circuit held that the Commission had not sufficiently explained its reasons for retaining either of these rules. *Fox Television Stations v. FCC*, 280 F.3d 1027, 1043–44, 1051–52 (D.C. Cir. 2002) ("*Fox I*"), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002) ("*Fox II*"). As for the national television ownership rule, the Court determined that the agency had taken a "wait and see" approach in evaluating its competition and diversity effects, which was impermissible in light of § 202(h)'s mandate to repeal or modify rules found no longer necessary in the public interest. *Id.* at 1042. It remanded the rule to the Commission for additional justification. *Id.* at 1049. The Court vacated the cable/broadcast cross-ownership rule, however, finding that the Commission's

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independent voices would remain post-merger, or (3) one radio station notwithstanding the number of independent voices in the market. *Id.*

[6] The Commission also announced that it would propose modification of the newspaper/broadcast cross-ownership rule and the dual network rule (which allows a broadcast station to affiliate with more than one network except that stations may not affiliate with more than one of the four largest networks: ABC, CBS, Fox, and NBC, *see* 47 C.F.R. § 73.658(g)). The Commission also found that the local radio rule was necessary in the public interest, but announced that it would seek further comments on alternative methods for defining radio station markets. *1998 Biennial Regulatory Review* ¶ 4.

decision to retain it was arbitrary and capricious and contrary to § 202(h). *Id.* at 1053.

A few months later, the same Court reviewed the local television multiple-ownership rule. *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002). The petitioner challenged the "eight independent voices" exception, contending that it lacked foundation or connection to the Commission's goal of promoting diversity in local markets. *Id.* at 152. The Court determined that the Commission had adequately justified its decision to retain the local television rule under the APA and § 202(h), but that it had not provided a rational basis for the exclusion of non-broadcast media from the eight voices exception. *Id.* at 165. It remanded the rule for the Commission's further justification. *Id.* at 169.

E. The Commission's 2003 Report and Order

In September 2002 a Notice of Proposed Rulemaking (the "Notice") announced that the Commission would review four of its broadcast ownership rules pursuant to § 202(h): the 35% national audience reach limit remanded in *Fox*; the local television rule remanded in *Sinclair*; the radio/television cross-ownership rule; and the dual network rule. *2002 Biennial Regulatory Review Notice of Proposed Rulemaking*, 17 F.C.C.R. 18,503, ¶ 6 (2002). The Notice also advised that the Commission was incorporating into its biennial review pending proceedings on two additional rules: its rule limiting radio station ownership in local markets and its rule prohibiting newspaper/broadcast cross-ownership. *Id.* ¶ 7.

The Commission established a Media Ownership Working Group ("MOWG"), which commissioned twelve studies ranging from consumer surveys to economic analyses of media markets. These reports were released for public comment in October 2002. Interested parties filed thousands of pages of comments, consisting of legal, social, and economic analyses, empirical and anecdotal evidence, and industry and consumer data to respond to the issues identified in the Commission's Notice. Notably, nearly two million

people weighed in by letters, postcards, e-mails, and petitions to oppose further relaxation of the rules. *Statement of Commissioner Jonathan S. Adelstein, Dissenting*, 18 F.C.C.R. 13,974, 13,977 (July 2, 2003). The Commission also heard public comment at a February 2003 "field hearing" in Richmond, Virginia.[7]

On June 2, 2003, the Commission adopted the Order modifying its ownership rules to provide a "new, comprehensive framework for broadcast ownership regulation" by a vote of 3-2.[8] *Order* ¶ 3. The Order was released on July 2, 2003.

F. The Order's Modification of Broadcast Media Ownership Rules

After reaffirming the Commission's three traditional policy objectives in promoting the public interest—competition, diversity, and localism - *Order* ¶ 8, the Commission considered whether each of the six rules remained in the public interest and proposed modifications where it believed necessary. With respect to each of the rules, the Commission determined as follows.

1. Local Television Ownership

The existing local television ownership rule allowed television station duopolies, so long as at least one of the stations was not ranked among the market's four largest stations and so long as at least eight independently owned and operated full-power television stations would remain in the market post-merger. 47 C.F.R. § 73.3555(b). The Order modified this rule to permit television station triopolies in markets with 18 or more television stations and television

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[7] Two Commissioners (Jonathan S. Adelstein and Michael J. Copps) held and attended, between them, thirteen additional public forums, using their own office resources. *Statement of Commissioner Michael J. Copps, Dissenting*, 18 F.C.C.R. 13,951, 13,956 (July 2, 2003).

[8] Commissioners Copps and Adelstein dissented.

station duopolies in markets with 17 or fewer television stations. *Order* ¶ 134. These limits are subject to the restriction (effectively a ban subject to a waiver provision) that a single firm may not own more than one top-four station in a market. This restriction forecloses common station ownership in markets with fewer than five television stations. *Id.* ¶ 186. The existing rule effectively precludes duopolies in most markets; only the largest 70 markets of the nation's 210 DMAs could comply with the "eight voices" test. *Adelstein Dissent*, 18 F.C.C.R. at 13,998. The new rule would allow triopolies in the nine largest DMAs, which represent 25.2% of the population. Duopolies could exist under the new rule in the largest 162 markets, representing 95.4% of the nation's population. *Id.* at 13,997–98.

2. Local Radio Ownership

Although the Order retained the existing numerical limits on radio ownership that Congress established in § 202(b) of the 1996 Act,[9] it modified other aspects of the rule. First, it changed the method for determining radio markets by replacing the "contour-overlap" method (described in detail in Part VI.B *infra*) with the geography-based market delineations created by Arbitron, a company that generates

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[9] In the 1996 Act, Congress directed the Commission to revise the local radio ownership limits to provide that: (1) in a radio market with 45 or more commercial radio stations, a party may own up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM); (2) in a radio market with between 30 and 44 commercial radio stations, a party may own up to 7 commercial radio stations, not more than 4 of which are in the same service; (3) in a radio market with between 15 and 29 commercial radio stations, a party may own up to 6 commercial stations, not more than 4 of which are in the same service; and (4) in a market with 14 or fewer commercial radio stations, a party may own up to 5 commercial radio stations, not more than 3 of which are in the same service, except that a party may not own more than 50 percent of the stations in that market. 1996 Act, § 202(b)(1), 110 Stat. at 110.

market data for radio advertisers. *Order* ¶ 239. Additionally, the Commission would now include noncommercial stations in the station count for each market. *Id.* The Commission grandfathered any existing radio station combinations rendered noncompliant under the newly defined markets, *Id.* ¶ 484, but generally restricted transfer of these combinations, *Id.* ¶ 487. The Commission also changed the local radio ownership rule by deciding to attribute "Joint Sales Agreements" (agreements under which a licensee sells advertising time on its station to a broker station for a fee) toward the brokering entity's numerical limit. *Id.* ¶ 239.

3&4. Newspaper/Broadcast and Radio/Television Cross-Ownership

The Commission has prohibited common ownership of a full-service television broadcast station and a daily public newspaper in the same community since 1975. *Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, 50 F.C.C.2d 1046 (1975). Additionally, the Commission regulates the number of television and radio stations that may be commonly owned with limits that vary with the size of the market. 47 C.F.R. § 73.3555(c).

The Order announced the Commission's decision to repeal both cross-ownership rules (television/newspaper, radio/television) and replace them with a single set of Cross-Media Limits. The Commission determined that neither cross-ownership prohibition remained necessary in the public interest to ensure competition, diversity, or localism. *Order* ¶¶ 330, 371. The new Cross-Media Limits prohibit newspaper/broadcast combinations and radio/television combinations in the smallest DMAs, *i.e.*, those with three or fewer full-power commercial or noncommercial television stations. *Id.* ¶ 454. In contrast, in the largest markets—those with more than eight television stations—common ownership among newspapers and broadcast stations is unrestricted. *Id.*

¶ 473. In medium-sized markets—those with between four and eight television stations—one entity may own a newspaper and either (a) one television station and up to 50% of the radio stations that may be commonly owned in that market under the local radio rule or (b) up to 100% of the radio stations allowed under the local radio rule. *Id.* ¶ 466.

In structuring its Cross-Media Limits, the Commission drew upon a methodological tool named the "Diversity Index," which the Commission developed as a measure of viewpoint diversity in local markets to identify those "at-risk" markets where consolidation would have a deleterious effect. *Id.* ¶¶ 391, 442. The Diversity Index, explained more fully in Part IV.D.1 below, is a highly modified version of the formula for measuring market concentration—the Herfindahl-Hirschman Index—applied by the Department of Justice and Federal Trade Commission to analyze mergers. *Id.* ¶ 428.

5. National Television Ownership

The national television ownership rule prohibits entities from owning television stations that in the aggregate reach a certain percentage of our country's households. 47 C.F.R. § 73.3555(e)(1). Section 202(c) of the 1996 Act directed the Commission to delete the then-existing twelve-station cap and raise the audience reach limit from 25% to 35%. After the D.C. Circuit Court remanded the Commission's decision in the 1998 biennial review to retain the limit at 35%, *Fox I*, 280 F.3d at 1049, the Commission decided to increase the audience reach limit to 45%. *Order* ¶ 499. The Commission also declined to repeal or modify its existing 50% discount for UHF stations' audiences as counted toward the audience reach limit. *Id.* ¶ 500.

6. Dual Network Rule

Under the dual network rule, a television station may affiliate with more than one network except that it may not affiliate with more than one of the four largest networks,

ABC, CBS, Fox, and NBC. 47 C.F.R. § 73.658(g). The rule effectively permits common ownership of networks to the exclusion of the top four. *Order* ¶ 592. The Commission determined that the dual network rule remained necessary in the public interest, and thus did not repeal or modify it. *Id.*[10]

G. Procedural History of the Current Appeals

Within days of the publication of the Order, several organizations filed petitions for review of the Commission's revised rules in various courts of appeals, some contending that the Commission had gone too far in revising the rules, and others asserting that the Commission had not gone far enough. Some of these organizations, including the Prometheus Radio Project, filed their petitions in this Court. Under 28 U.S.C. § 2112(a), petitions to review administrative orders filed in different circuit courts within the first ten days of the appeal period trigger a lottery conducted by the Judicial Panel on Multidistrict Litigation. On August 19, 2003, the Panel announced that our Court had been selected in the lottery and consolidated the appeals here. We entered a stay of the effective date of the proposed rules after a hearing on September 3, 2003. *Prometheus Radio Project v. FCC*, No. 03-3388, 2003 WL 22052896 (3d Cir. Sept. 3, 2003). We then denied the Deregulatory Petitioners' motion, joined by the Commission, to transfer venue to the D.C. Circuit Court on September 16, 2003. *Prometheus Radio Project v. FCC*, No. 03-3388 (3d Cir. Sept. 16, 2003) (order denying motion to transfer). After pushing back briefing and oral argument at the request of the parties, on February 11, 2004, we heard approximately eight hours of oral argument addressing the merits of Petitioners' claims.

H. Subsequent Legislation

In January 2004, while the petitions to review the Order were pending in this Court, Congress amended the 1996 Act

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[10] No party to this case challenges the retention of this rule.

by increasing from 35% to 39% the national television ownership rule's audience reach cap in § 202(c). Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99 (2004). The legislation also amended § 202(h) in two ways: (1) making the Commission's biennial review obligation quadrennial; and (2) insulating from § 202(h) review "rules relating to the 39 percent national audience reach limitation." 118 Stat. at 100. Prior to oral argument, Petitioners filed letter briefs addressing the effect of these amendments on their challenges to the Order.

II. Jurisdiction and Standard of Review

This is an appeal of an agency decision under the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.* Our jurisdiction is based on 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). Our standard of review is governed by the APA and the 1996 Act provision authorizing the Commission's periodic regulatory review.[11]

A. Standard of Review Under the Administrative Procedure Act

Our standard of review in the agency rulemaking context is governed first by the judicial review provision of the APA, 5 U.S.C. § 706. Under it, we "hold unlawful or set aside

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[11] The Deregulatory Petitioners raise an additional threshold argument that *Fox* and *Sinclair* provide the "law of the case" because the Order results in part from the D.C. Circuit Court's remand in those two decisions. Though we recognize that the Order must be consistent with these remand directives, the decisions themselves do not fit within the law of the case doctrine, under which a prior decision binds only future proceedings in the "same litigation." *See, e.g., Hamilton v. Leavy*, 322 F.3d 776, 786—87 (3d Cir. 2003). This case involves petitions for review of the Commission's comprehensive reexamination of a larger set of its broadcast ownership rules, in which a different set of parties participated, a different record was compiled, and different results were reached. So understood, the law of the case doctrine does not constrain our review here.

agency action, findings, and conclusions" that are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law . . . [or] unsupported by substantial evidence." *Id.* § 706(2)(a), (e); *N.J. Coalition for Fair Broad. v. FCC*, 574 F.2d 1119, 1125 (3d Cir. 1978).

The scope of review under the "arbitrary and capricious" standard is "narrow, and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*"). Nevertheless, we must ensure that, in reaching its decision, the agency examined the relevant data and articulated a satisfactory explanation for its action, including a "rational connection between the facts found and the choice made." *Id.* (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). Normally, we may find an agency rule is arbitrary and capricious where

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given.

Id. (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)); *see also Robert Wood Johnson Univ. Hosp. v. Thompson*, 297 F.3d 273, 280 (3d Cir. 2002). Put another way, we reverse an agency's decision when it "is not supported by substantial evidence, or the agency has made a clear error in judgment." *AT&T Corp. v. FCC*, 220 F.3d 607, 616 (D.C. Cir. 2000) (citing *Kisser v. Cisneros*, 14 F.3d 615, 619 (D.C. Cir. 1994)).

We will, however, "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *State Farm*, 463 U.S. at 43 (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)). But an agency that departs from its "former views" is "obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance" in order to survive judicial scrutiny for compliance with the APA. *State Farm*, 463 U.S. at 41-42.

Finally, the traditional APA standard of review is even more deferential "where the issues involve 'elusive' and 'not easily defined' areas such as programming diversity in broadcasting." *Sinclair*, 284 F.3d at 159. Yet even when an administrative order involves policy determinations on such elusive goals, a "rationality" standard is appropriate. *See NCCB*, 436 U.S. at 796–97 (finding that the Commission acted rationally in determining that diversification of ownership would enhance the possibility of increasing diverse viewpoints). Additionally, when an agency has engaged in line-drawing determinations and our review is necessarily deferential to agency expertise, *see AT&T Corp.*, 220 F.3d at 627, its decisions may not be "patently unreasonable" or run counter to the evidence before the agency. *Sinclair*, 284 F.3d at 162.

B. Standard of Review Considerations Under Section 202(h)

The Order was promulgated as part of the periodic review requirements of § 202(h) of the 1996 Act. Consequently, our review standard is informed by that provision, which, at the time of the Order's release, read:

> (h) Further Commission Review. The Commission shall review its rules adopted pursuant to this section and all of its ownership

> rules biennially[12] as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.

110 Stat. 111-12. Section 11 of the Communications Act, to which § 202(h) refers, was also added by the 1996 Act to ensure that the Commission review periodically its regulations governing telecommunications services to "determine whether any such regulation is no longer necessary in the public interest as a result of meaningful economic competition between providers of such service" and "repeal or modify any regulation it determines to be no longer necessary in the public interest." 47 U.S.C. § 161.

The text and legislative history of the 1996 Act indicate that Congress intended periodic reviews to operate as an "ongoing mechanism to ensure that the Commission's regulatory framework would keep pace with the competitive changes in the marketplace" resulting from that Act's relaxation of the Commission's regulations, including the broadcast media ownership regulations. *2002 Biennial Regulatory Review*, 18 F.C.C.R. 4726, ¶¶ 16, 17 (2003) (citing preamble to the 1996 Act; H.R. Conf. Rep. No. 104-458 (1996)). Put another way, the periodic review provisions require the Commission to "monitor the effect of . . . competition . . . and make appropriate adjustments" to its regulations. *Id.* ¶ 5.

As noted, the first sentence of § 202(h) requires the Commission to "determine" whether media concentration

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[12] As noted in Part I.H above, Congress has since replaced "biennially" with "quadrennially" in this provision.

rules are "necessary in the public interest as the result of competition." The second sentence contains a separate instruction to the Commission: to "repeal or modify" those rules "no longer in the public interest." 110 Stat. 111-12. We analyze each of these instructions in turn.

1. "Determine whether any such rules are necessary in the public interest."

Recognizing that competitive changes in the media marketplace could obviate the public necessity for some of the Commission's ownership rules, the first instruction requires the Commission to take a fresh look at its regulations periodically in order to ensure that they remain "necessary in the public interest." This raises the question of what is "necessary."

In the context of § 11 of the Communications Act, 47 U.S.C. § 161-which, like § 202(h), requires the Commission periodically to review its telecommunications regulations and determine whether they "remain necessary in the public interest"—the Commission has interpreted "necessary" to mean "useful," "convenient" or "appropriate" rather than "required" or "indispensable." Setting out its rationale for this interpretation in the *2002 Biennial Regulatory Review*, 18 F.C.C.R. 4726, ¶¶ 14-22 (2003), the Commission determined that the 1996 Act's legislative history indicated that Congress meant "no longer necessary" to mean "no longer in the public interest" and "no longer meaningful." 18 F.C.C.R. 4726, ¶ 17 (citing H.R. Conf. Rep. No. 104-458, at 185 (1996)).

Next, the Commission found that an "indispensable" construction of "necessary" as to § 11 would be unreasonably inconsistent with the Communications Act's grant of general rulemaking authority to the Commission. *Id.* ¶ 18 n.31. Under 47 U.S.C. § 201(b) the Commission is authorized to "prescribe such rules and regulations [regarding services and charges of communications common carriers] as may be necessary in the public interest to carry out the provisions of

this Act." In *AT&T Corp. v. Iowa Utilities Board*, the Supreme Court interpreted this provision as a grant of "general rulemaking authority." 525 U.S. 366, 374 (1999). Characterizing this interpretation "not as a limitation on the Commission's authority, but a confirmation of it," the Commission concluded that the standard of review applicable to its rulemaking authority under § 201 is a "plain public interest" standard. 18 F.C.C.R. 4276, ¶¶ 18 n.31, 22 (citing 525 U.S. at 374, 378). The Commission reasoned that the same standard must also apply to the review process required under § 11 in order to avoid absurd results. If the rulemaking and review standards were different, the Commission could promulgate any rule that is useful, but then, at the next periodic review, would have to revoke any of those rules that do not also meet a higher standard of "indispensable." *Id.* ¶ 18 & n.33. Under such a system, periodic review would either be inefficient or irrelevant, as the Commission could effectively sidestep the more stringent review standard by subsequently reissuing any "useful" rule that it had to repeal for failing to be "indispensable." *Id.* ¶ 18.

Lastly, the Commission rejected arguments that there is controlling judicial precedent for an "indispensable" construction of "necessary." It acknowledged that the Supreme Court and the D.C. Circuit Court of Appeals have upheld such constructions, *see id.* ¶ 19 (citing *Iowa Utils. Bd.*, 525 U.S. at 374, 378; GTE Serv. Corp. v. FCC, 205 F.3d 416 (D.C. Cir. 2000)), but countered that these cases "simply demonstrate that terms such as 'necessary' . . . must be read in their statutory context." *Id.* Furthermore, the Commission found judicial support for its interpretation of "necessary" in the D.C. Circuit Court's decision in *Sinclair*, 284 F.3d at 159, regarding the Commission's periodic review of its local television ownership rule under § 202(h). The Commission noted that the *Sinclair* Court did not expressly adopt any particular definition of "necessary," but, in affirming the Commission's § 202(h) finding that the rule furthers

diversity and is thus necessary in the public interest, *id.* at 160, it "did not articulate a new or higher public interest yardstick." 18 F.C.C.R. 4726, ¶ 20.[13] Nor did the D.C. Circuit Court's decision in *Fox* foreclose its interpretation of "necessary," the Commission determined, because on rehearing the Court deleted language in its initial decision that the Commission had applied too lax a standard in reviewing its broadcast media ownership rules under § 202(h).[14] *Id.* ¶ 14 (citing *Fox II*, 293 F.3d at 540).

For these reasons, the Commission determined that § 11's requirement that it review its telecommunications regulations to determine whether they remain "necessary in the public interest" does not require it to employ a more stringent standard than "plain public interest" found in other parts of the Communications Act. *Id.* ¶¶ 18, 22 (citing 47 U.S.C. § 201(b) as an example).

Recently, the D.C. Circuit Court upheld, in the context of § 11, the Commission's interpretation of "necessary" contained in the 2002 Biennial Regulatory Review. *Cellco P'ship v. FCC*, 357 F.3d 88 (D.C. Cir. 2004). Recognizing that "necessary" is a "chameleon-like" word whose "meaning ... may be influenced by its context," the *Cellco* Court determined that it would uphold any reasonable interpretation that did not contravene the express provisions of the

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[13] More generally, the Commission cited several Supreme Court decisions interpreting "necessary" to mean "useful" or "convenient" or "appropriate." *Id.* ¶ 15 n.24 (citing, *inter alia*, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413 (1819) (under the Constitution's Necessary and Proper Clause, U.S. Const. Art. I, § 8, cl. 18, "necessary" means "convenient" or "useful")).

[14] In addressing available remedies, the *Fox I* Court interpreted "necessary" to mean that "a regulation should be retained only insofar as it is necessary in, not merely consonant with, the public interest." 280 F.2d at 1050. This language was expressly excised in *Fox II*, 293 F.3d at 540.

Communications Act. *Id.* at 94, 96 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)). It went on to determine that the Commission's interpretation is both reasonable and consistent with the Communications Act, endorsing the Commission's view that "necessary" must mean the same thing in the periodic review context as in the rulemaking context in order to avoid absurd results. *Id.* at 98.

Cellco also acknowledged that the Commission's interpretation of "necessary" is consistent with the many courts that have endorsed a "useful" or "appropriate" interpretation over an "essential" or "indispensable" one. *Id.* at 97 (citing, *inter alia*, *NCCB*, 436 U.S. at 795—96; *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413 (1819); *Cellular Telecomm. & Internet Ass 'n v. FCC*, 330 F.3d 502, 510 (D.C. Cir. 2003) (specifically rejecting an "indispensable" connotation of "necessary" as used in the Communications Act's enforcement forbearance provision, § 10(a))).

Finally, the *Cellco* Court rejected suggestions that the Commission's interpretation was inconsistent with its prior decisions in *Sinclair* and *Fox*. As noted above, *Sinclair* did not expressly adopt any particular definition of "necessary" and *Fox I*'s suggestion of a heightened standard was expressly retracted by *Fox II*, 293 F.3d at 540. *Cellco* limited *Fox I*'s statement that "necessary" implied a presumption in favor of modification or elimination of existing regulations, *see* 280 F.3d at 1048, to the context in which it was made: discussing whether vacating or remanding the national television ownership rule was the appropriate remedy. *Cellco*, 357 F.3d at 98. And while *Sinclair* apparently endorsed this language from *Fox I*, *see* 284 F.3d at 159, the *Cellco* Court characterized *Sinclair* as merely "piggyback[ing]" on *Fox I* without "adopt[ing] a general presumption in favor of modification or elimination of regulations when considering a substantive challenge to the

adequacy of the Commission's determinations." *Cellco*, 357 F.3d at 98. In sum, the D.C. Circuit Court determined that the definition of "necessary" was not constrained by either its *Fox* or *Sinclair* decision. It remained an open issue for the Commission to decide in the first instance, as it did when it released the 2002 Biennial Regulatory Review. *Id.*

For the same reasons proffered by the Commission and endorsed by the D.C. Circuit Court to reject the "indispensable" definition of "necessary" under § 11, we do so under § 202(h). Though § 11 and § 202(h) are separate statutory provisions, they are both periodic review provisions from the same statute. As evidence of their relatedness, § 202(h) imposes periodic review obligations "as part of its regulatory reform review under section 11 of this Communications Act of 1934," 110 Stat. at 111.[15] We see no reason to adopt a different definition of "necessary" under § 202(h) than under § 11. Moreover, interpreting § 202(h)'s first sentence to require the Commission to review its rules to determine whether they are indispensable in the public interest would lead to incongruous results when compared to the instruction in § 202(h)'s second sentence, which requires the Commission to "repeal or modify any regulation it determines to be no longer in the public interest.[16] For the "determine" instruction to be meaningful, "necessary" must embody the same "plain public interest" standard that

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[15] Additionally, the Commission itself impliedly incorporated the 2002 Biennial Regulatory Review's interpretation of "necessary" under § 11 when citing it in the "legal framework" section of the Order. *Order* ¶ 11 n.15.

[16] Because § 202(h) omits the word "necessary" in the "repeal or modify" instruction, it is arguably even more amenable to the "appropriate" or "useful" connotation of "necessary" than § 11. But like the Commission, "we do not think that difference [between § 11 and § 202(h)] is significant given what we believe `necessary in the public interest' means." 18 F.C.C.R. 4726, ¶ 14 n.20.

Congress set out in the "repeal or modify" instruction."[17] Lastly, as explained by the *Cellco* Court, the "convenient," "useful," or "helpful" definition of "necessary" is not foreclosed to the Commission by any judicial precedent, including *Fox* and *Sinclair*. So in interpreting the Commission's obligation under § 202(h) to review its broadcast media ownership rules to determine whether they are "necessary in the public interest," we adopt what the Commission termed "the plain public interest" standard under which "necessary" means "convenient," "useful," or "helpful," not "essential" or "indispensable."

2. "Repeal or modify any regulations it determines to be no longer in the public interest."

Turning to the second instruction of § 202(h), the Commission is required to "repeal or modify" rules that are "no longer in the public interest." Having concluded that the first instruction requires the Commission to determine whether any existing rule fails to satisfy the "plain public interest" standard, the relationship between the first and second instruction is evident. Under the second instruction, the Commission must repeal or modify the regulations that it

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[17] Anticipating the argument that consistency between the first and second sentences could still be achieved using the "indispensable" interpretation of "necessary" for both, we respond that requiring the Commission to repeal or modify any regulations it determined were not essential to the public interest would lead to incongruous results when compared to the plain public interest standard that governs the Commission's authority to regulate the broadcast industry. *See NCCB*, 436 U.S. at 796 ("[S]o long as the regulations are not an unreasonable means for seeking to achieve the [Commission's public interest] goals, they fall within [its] general rulemaking authority" under the Communications Act.). Just as the Commission and *Cellco* observed in the § 11 context, the "repeal or modify" instruction would be meaningless because the Commission could repromulgate (in its rulemaking functions) under the lower "useful" standard any regulation it was forced to repeal or modify for not being "indispensable" under § 202(h).

has determined under the first instruction do not satisfy that same standard.

While we acknowledge that § 202(h) was enacted in the context of deregulatory amendments (the 1996 Act) to the Communications Act, *see Fox I*, 280 F.3d at 1033; *Sinclair*, 284 F.3d at 159, we do not accept that the "repeal or modify in the public interest" instruction must therefore operate only as a one-way ratchet, *i.e.*, the Commission can use the review process only to eliminate then-extant regulations. For starters, this ignores both "modify" and the requirement that the Commission act "in the public interest." What if the Commission reasonably determines that the public interest calls for a more stringent regulation? Did Congress strip it of the power to implement that determination? The obvious answer is no, and it will continue to be so absent clear congressional direction otherwise.[18]

What, then, makes § 202(h) "deregulatory"? It is this: Section 202(h) requires the Commission periodically to justify its existing regulations, an obligation it would not otherwise have. A regulation deemed useful when promulgated must remain so. If not, it must be vacated or modified.

Misguided by the *Fox* and *Sinclair* Courts' "deregulatory presumption" characterization and lacking the benefit of *Cellco*'s subsequent clarification, the Commission concluded that § 202(h) "appears to upend traditional administrative law principles" by not requiring it to justify affirmatively a rule's

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[18] For example, in enacting a periodic review requirement for the Commission's broadcast media ownership regulations, Congress gave no express indication that it intended to restrict the Commission's rulemaking authority. *See, e.g., Am. Hosp. Ass 'n v. NLRB*, 499 U.S. 606, 613 (1991) (stating that "if Congress had intended to curtail in a particular area the broad rulemaking authority [it has] granted[,] . . . we would have suspected it to do so in language expressly describing an exception [to that authority]")

repeal or modification. *Order* ¶ 11. This overstates the case. Rather than "upending" the reasoned analysis requirement that under the APA ordinarily applies to an agency's decision to promulgate new regulations (or modify or repeal existing regulations), *see State Farm*, 463 U.S. at 43, § 202(h) *extends* this requirement to the Commission's decision to retain its existing regulations. This interpretation avoids a crabbed reading of the statute under which we would have to infer, without express language, that Congress intended to curtail the Commission's rulemaking authority and to contravene "traditional administrative law principles."[19]

C. Conclusion

Though our standard of review analysis is lengthy, it is in the end amenable to a straightforward summing-up: In a periodic review under § 202(h), the Commission is required to determine whether its then-extant rules remain useful in the public interest; if no longer useful, they must be repealed or modified.[20] Yet no matter what the Commission decides

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[19] A purely textual inquiry is also of no avail to the Deregulatory Petitioners. As we noted above, § 202(h) does not use the word "necessary" in the second sentence to qualify the public interest standard that governs the Commission's "repeal or modify" instruction. Like the Commission (as we point out in note 16 *supra*), "we do not think that difference . . . is significant given what we believe `necessary in the public interest' means." 18 F.C.C.R. 4726, ¶ 14 n.20. But even if "necessary in the public interest" under the first sentence meant "indispensable," we still would not have to import that heightened standard to the second. Textually it is not there. If "necessary" appears twice in § 11 and in the first sentence of § 202(h), but is absent from its second sentence, logic favors deliberate omission by Congress over inadvertence.

[20] Although our dissenting colleague states that he differs "from the majority on the applicable standard of review," we can discern no real disagreement between his formulation of the standard of review and ours. Rather, we see disagreement only over the question of whether the Commission's Order survives the standard of review as we both have described it.

to do to any particular rule—retain, repeal, or modify (whether to make more or less stringent)—it must do so in the public interest and support its decision with a reasoned analysis. We shall evaluate each aspect of the Commission's Order accordingly.

III. Mootness and the National Television Ownership Rule

The national television ownership rule caps the number of television stations that a single entity may own on a national basis. In the 1996 Act, Congress limited the number of commonly owned stations to those reaching no more than 35% of the national audience. 1996 Act § 202(c)(1)(B), 110 Stat. 111. In its first biennial review, the Commission retained the 35% cap as "necessary in the public interest," but the D.C. Circuit Court held that the Commission had not adequately justified this decision. *Fox I*, 280 F.3d at 1048. On remand and in connection with its 2002 biennial review proceeding, the Commission increased the cap from 35% to 45%. *Order* ¶ 583. The Commission also decided to retain its method of discounting by 50% the audiences of UHF stations toward the cap. *Id.* ¶ 586.

Subsequently, however, Congress enacted a new national television ownership cap. In its 2004 Consolidated Appropriations Act, it modified § 202(c)(l)(B) of the 1996 Act to provide that "[t]he Commission shall modify its rules for multiple ownership . . . by increasing the national audience reach limitation for television stations to 39%." *See* Pub. L. No. 108-199, § 629, 118 Stat. 3, 99 (2004). Because the Commission is under a statutory directive to modify the national television ownership cap to 39%, challenges to the Commission's decision to raise the cap to 45% cap are moot.[21] *Cf. PLMRS Narrowband Corp. v. FCC*, 182 F.3d

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[21] The Deregulatory Petitioners stated that the Commission's rationale for retaining a national television ownership limit "raises troubling First

(Continued...)

995, 1002 (D.C. Cir. 1999) (challenges to Commission's later-modified order are moot).

Although the 2004 Consolidated Appropriations Act did not expressly mention the UHF discount, challenges to the Commission's decision to retain it are likewise moot. Congress instructed the Commission to "increase the national audience reach limitation for television stations to 39%." 118 Stat. at 99. Since 1985 the Commission has defined "national audience reach" to mean "the total number of television households" reached by an entity's stations, except that "UHF stations shall be attributed with 50 percent of the television households" reached. 47 C.F.R. § 73.3555(e)(2)(i); *Multiple Ownership of AM, FM and Television Broadcast Stations*, 50 Fed. Reg. 4666, 4676 (Feb. 1, 1985). We assume that when Congress uses an administratively defined term, it intended its words to have the defined meaning. *See, e.g., Bragdon v. Abbott*, 524 U.S. 624, 631 (1998). Furthermore, because reducing or eliminating the discount for UHF station audiences would effectively raise the audience reach limit, we cannot entertain challenges to the Commission's decision to retain the 50% UHF discount. Any relief we granted on these claims would undermine Congress's specification of a precise 39% cap.

As additional evidence of the mootness of challenges to the UHF discount, we note that the 2004 Consolidated Appropriations Act also added a sentence to § 202(h): "This

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Amendment questions." Br. of Petitioners Fox, NBC, Telemundo, and Viacom ("Network Petitioners") at 31. We recognize that a constitutional challenge would not necessarily be mooted by intervening legislation. But even if we interpreted this "troubling . . . questions" language as raising a constitutional challenge to the 45% national audience reach limit, we see no reason to decide the constitutionality of Congress's 39% limit, as these same Petitioners subsequently argued that "any pending challenges to the June order [regarding the national television ownership rule] will be mooted" by the 2004 Consolidated Appropriations Act. Network Petitioners' Letter Br. at 2 (Feb. 2, 2004).

subsection does not apply to any rules relating to the 39% national audience limitation." 118 Stat. at 100. The UHF discount is a rule "relating to" the national audience limitation. *See* 47 C.F.R. § 73.3555(e)(2) (providing for the UHF discount in a section qualified "for the purposes of this paragraph (e)," the national television ownership rule paragraph). Congress apparently intended to insulate the UHF discount from periodic review, a position that is consistent with our reading of the legislation as endorsing the almost 20-year-old regulatory definition of "national audience reach" that provides for the UHF discount.

Although we find that the UHF discount is insulated from this and future periodic review requirements, we do not intend our decision to foreclose the Commission's consideration of its regulation defining the UHF discount in a rulemaking outside the context of Section 202(h). The Commission is now considering its authority going forward to modify or eliminate the UHF discount and recently accepted public comment on this issue. 69 Fed. Reg. 9216–17 (Feb. 27, 2004). Barring congressional intervention, *see, e.g.*, S. 1264, 108th Cong. § 12 (2003) (proposing phase-out and 2008 sunset of the UHF), the Commission may decide, in the first instance, the scope of its authority to modify or eliminate the UHF discount outside the context of § 202(h).

IV. Cross-Ownership Rules

The Commission's decision to repeal its newspaper/broadcast cross-ownership rules[22] in favor of new Cross-Media Limits has been attacked on all fronts. Some petitioners support the repeal but argue that the Cross-Media Limits are too restrictive. Others challenge the repeal decision and argue that the new limits are too lenient. We

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[22] The Commission also repealed its radio/television cross-ownership rule in favor of the Cross-Media Limits, but no petitioner challenges this aspect of the Order.

conclude that the Commission's decision to replace its cross-ownership rules with the Cross-Media Limits is not of itself constitutionally flawed and does not violate § 202(h). But we cannot uphold the Cross-Media Limits themselves because the Commission does not provide a reasoned analysis to support the limits that it chose.

A. Regulatory Background and the 2002 Biennial Review

Since the 1970s, the Commission has enforced two separate limits on the common ownership of different-type media outlets in local markets. One cross-ownership rule prohibits the common ownership of a full-service television broadcast station and a daily public newspaper in the same community. 47 C.F.R. § 73.3555(d). The other limits the number of television and radio stations to the following combinations: (1) in markets where at least 20 independently owned media voices would remain post-merger, two television stations and six radio stations or one television station and seven radio stations; (2) in markets where at least 10 independent voices would remain, two television stations and four radio stations; and (3) in other markets, two television stations (subject to the local television ownership rule) and one radio station. *Id.* § 73.3555(c).

The Commission considered both cross-ownership rules during its 2002 biennial review under § 202(h). In the Order, the Commission announced that because neither rule remained necessary in the public interest, it was repealing them and replacing them with a single set of Cross-Media Limits. The three-tiered Cross-Media Limits regulate common ownership depending on the size of the market: small (those with three or fewer full-power commercial or noncommercial television stations), mid-sized (between four and eight television stations), and large (more than eight television stations). In small markets, newspaper/broadcast combinations and radio/television combinations are prohibited. *Order* ¶ 454. In medium-sized markets, an entity

may own a newspaper and either (a) one television station and up to 50% of the radio stations that may be commonly owned in that market under the local radio rule or (b) up to 100% of the radio stations allowed under the local rule. *Id.* ¶ 466. In large markets, cross-ownership is unrestricted. *Id.* ¶ 473.

B. The Commission's decision not to retain a ban on newspaper/broadcast cross-ownership is justified under § 202(h) and is supported by record evidence.

The Commission determined that the rule prohibiting newspaper/broadcast cross-ownership was no longer necessary in the public interest for three primary reasons: (1) the ban is not necessary to promote competition in local markets because most advertisers do not view newspapers and television stations as close substitutes, *Order* ¶ 332; (2) the ban undermines localism by preventing efficient combinations that would allow for the production of high-quality local news, *id.* ¶ 343; and (3) there is not enough evidence to conclude that ownership influences viewpoint to warrant a blanket cross-ownership ban, thus making it unjustifiable on diversity grounds, *id.* at ¶ 364, (and moreover, the presence of other media sources—such as the Internet and cable—compensate for the viewpoint diversity lost to consolidation, *id.* 365). The Citizen Petitioners object to the localism and diversity components of the Commission's rationale. We conclude differently, as reasoned analysis supports the Commission's determination that the blanket ban on newspaper/broadcast cross-ownership was no longer in the public interest. Part II.C *supra*.

1. Newspaper/broadcast combinations can promote localism.

The Commission measured the promotion of localism by considering "the selection of programming responsive to local needs and interests, and local news quantity and quality." *Order* ¶ 78. Evidence that existing (grandfathered)

newspaper-owned broadcast stations produced local news in higher quantity with better quality than other stations convinced the Commission that the ban on newspaper/broadcast combinations undermined its localism interest. The Commission principally relied on the findings of its MOWG study that newspaper-owned television stations provide almost 50% more local news and public affairs programming than other stations, an average of 21.9 hours per week. *Id.* ¶ 344 (citing Thomas C. Spavins *et al.*, *The Measurement of Local Television News and Public Affairs Programs* (MOWG Study No. 7) at 3 (Sept. 2002)). The Commission also found corresponding advantages in quality of local coverage provided by newspaper-owned stations, as shown by ratings (measuring consumer approval) and industry awards (measuring critical approval). *Id.* ¶ 344–45 (citing, among other things, findings by the Project for Excellence in Journalism that newspaper-owned stations "were more likely to do stories focusing on important community issues and to provide a wide mix of opinions, and they were less likely to do celebrity and human interest features").

The Citizen Petitioners argue that the MOWG study was flawed because it examined *all* newspaper/broadcast station combinations, including "intermarket" combinations (entities that own a newspaper and broadcast stations in different cities), as well as "intramarket" combinations (entities that own a newspaper and a broadcast station in the same city). But the Citizens Petitioners do not suggest that a study entirely focused on intramarket combinations would have different results. The six intramarket combinations that were included in the study (grandfathered exceptions to the cross-ownership ban) averaged more local news and public affairs programming as compared to the overall average (26 weekly hours compared to 21.9) and higher ratings for their 5:30 p.m. and 6:00 p.m. news programs (9.8 and 11 compared to 7.8 and 8.2). *MOWG Study No. 7* app. A; *Comments of*

Newspaper Association of America, MB Docket No. 02-277 at 15 (Jan. 2, 2003).

The Citizen Petitioners also protest the Commission's reliance on anecdotal evidence of pro-localism combinations and its disregard of anecdotal evidence to the contrary. Significantly, however, the Commission used anecdotal evidence[23] merely to illustrate its statistical findings—it did not rely on anecdote as the sole basis for its conclusions about localism. Moreover, the Commission properly discounted anecdotal evidence of a Canadian newspaper conglomerate's detrimental effect on localism. Can West, which controls 30% of Canada's daily newspaper circulation, requires its newspaper editors to publish editorials from headquarters, which it forbids local editorials to contradict. But the Commission explained that the Can West example shows the peril of national ownership and corporate centralization of media services, which is not relevant to the Commission's regulations on local combinations. *Order* ¶ 352. In summary, the Citizen Petitioners' arguments do not unsettle the Commission's conclusion that the newspaper/broadcast cross-ownership ban undermined localism.

2. A blanket prohibition on newspaper/broadcast combinations is not necessary to protect diversity.

The Commission offered two rationales for its conclusion that a blanket prohibition on newspaper/broadcast combinations is no longer necessary to ensure diversity in

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[23] For example, Gannett Company reported that the "media integration" resulting from its newspaper/broadcast combination in Phoenix "improved efficiency, particularly in situations characterized by fast-breaking news such as the massive wildfires near Phoenix last year." Both of Belo Corporation's Dallas outlets "have been able to cover a wider range of stories through information sharing between the separate newspaper and television news staffs." *Order* ¶ 348.

local markets. First, it found that "[c]ommonly-owned newspapers and broadcast stations do not necessarily speak with a single, monolithic voice." *Id.* ¶ 361. Given conflicting evidence in the record[24] on whether ownership influences viewpoint, the Commission reasonably concluded that it did not have enough confidence in the proposition that commonly owned outlets have a uniform bias to warrant sustaining the cross-ownership ban. *Id.* ¶ 364.

Second, the Commission found that diverse viewpoints from other media sources in local markets (such as cable and the Internet) compensate for viewpoints lost to newspaper/broadcast consolidations. *Id.* ¶ 366. We agree record evidence suggests that cable and the Internet supplement the viewpoint diversity provided by broadcast and newspaper outlets in local markets.[25] As discussed more fully below, we believe that the Commission gave too much weight to the Internet in deriving the Cross-Media Limits. But separate from the question of degree, we conclude that it

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[24] On one hand, the record contained examples of a newspaper-owner's affiliations and biases influencing the news and editorial pages. But there were also examples of commonly owned newspapers expressing different viewpoints (such as that the Tribune Company's newspapers did not endorse the same candidate in the 2000 presidential election). The MOWG submitted a statistical study of 10 newspaper-television combinations; in half of them the newspaper's overall "slant" was noticeably different from the broadcast television's "slant" on the news. *See* David Pritchard, *Viewpoint Diversity in Cross-Owned Newspapers and Television Stations: A Study of News Coverage of the 2000 Presidential Campaign* (MOWG Study No. 2) (Sept. 2002). But the Pritchard Study was the subject of much criticism for its flawed methodology (no control group of independent media outlets for comparison) and narrow scope (it only looked at one factor in judging "slant"). *Order* ¶ 362.

[25] *See, e.g.*, Joel Waldfogel, *Consumer Substitutability Among Media* (MOWG Study No. 3) (Sept. 2002) (suggesting that consumers view Internet news sources as a substitute for daily newspapers and broadcast news).

was acceptable for the Commission to find that cable and the Internet contribute to viewpoint diversity.

C. The Commission's decision to retain some limits on common ownership of different-type media outlets was constitutional and did not violate § 202(h).

The Deregulatory Petitioners support the Commission's repeal of the newspaper/broadcast cross-ownership ban but object to its decision to retain any restriction on the common ownership of newspaper and broadcast media outlets. First they argue that any limits on newspaper/broadcast cross-ownership violate § 202(h), because, as the Commission acknowledges, the evidence suggests that the cross-ownership restrictions are not in the public interest. They also argue that the Cross-Media Limits violate the First and Fifth Amendments of the United States Constitution. We disagree on all counts.

1. Continuing to regulate cross-media ownership is in the public interest.

The Commission's finding that a blanket prohibition on newspaper/broadcast cross-ownership is no longer in the public interest does not compel the conclusion that no regulation is necessary. *See Order* ¶ 364. As described above, the Commission found evidence to undermine the premise that ownership always influences viewpoint,[26] but it

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[26] Indeed, ample evidence supported its conclusion that ownership can influence viewpoint. *See Order* ¶¶ 24–25; *Comments of the UCC et al.*, MB Docket No. 02-277 at 4 (Jan. 2, 2003) ("*UCC Comments*") (citing a Pew Research Center study of television journalists and executives that found nearly one quarter of journalists purposefully avoid newsworthy stories and nearly as many soften the tone of stories to benefit the interest of their news organizations); *Id.* at 5 (citing a 2002 study finding that outlets included more references to their own products and services and treated those items more favorably than others, thus exhibiting a "synergy bias"); *Comments of Consumer Federation of America*, MB Docket 02-277 at 41 (Jan. 2, 2003) (citing a 2002 study finding that election

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did not find the opposite to be true. And while the Commission found that other media sources contributed to viewpoint diversity in local markets, it could not have found that the Internet and cable were complete substitutes for the viewpoints provided by newspapers and broadcast stations. *See MOWG Study No. 3* (finding that the Internet and cable rank as sources of local news, but they do not outrank newspapers and broadcast television). Given the Commission's goal of balancing the public's interests in competition, localism, and diversity, it reasonably concluded that repealing the cross-ownership ban was necessary to promote competition and localism, while retaining some limits was necessary to ensure diversity.[27]

2. Continuing to regulate cross-media ownership does not violate the Fifth Amendment.

The Deregulatory Petitioners argue that the Cross-Media Limits violate the Equal Protection Clause of the Fifth Amendment because they single out newspaper owners for special restrictions that do not apply to other media outlets. This argument is foreclosed, however, by the Supreme Court's decision in *NCCB* that endorsed the constitutionality of the 1975 newspaper/television cross-ownership ban. 436 U.S. at 801-02. Rather than concluding that newspaper owners were singled out for different treatment, the Court determined that "the regulations treat newspaper owners in essentially the same fashion as other owners of the major

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information on news pages was slanted in favor of candidate endorsed on the editorial page); *Id.* at 44 (citing a 2001 survey of news directors finding that media owners and sponsors pressure reporters to slant the news).

[27] We also note that the Commission provided for a waiver of the Cross-Media Limits upon a demonstration "that an otherwise prohibited combination would, in fact, enhance the quality and quantity of broadcast news available in the market." *Order* ¶ 481.

media of mass communication" by imposing limits on them as well as owners of television and radio stations. *Id.* at 801. We decline the Deregulatory Petitioners' invitation to disregard Supreme Court precedent because of changing times. Surely there are more media outlets today (such as cable, the Internet, and satellite broadcast) than there were in 1978 when NCCB was decided. But it cannot be assumed that these media outlets contribute significantly to viewpoint diversity as sources of local news and information. *See* Part IV.D.2 *infra*. Even if it could, it is the Supreme Court's prerogative to change its own precedent. *See State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (stating that only the Supreme Court can overrule its own precedent); *Am. Civil Liberties Union of N.J. v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1484 (3d Cir. 1996) (stating that we are obliged to follow Supreme Court precedent "until instructed otherwise by a majority of the Supreme Court").

3. Continuing to regulate cross-media ownership does not violate the First Amendment.

The Deregulatory Petitioners argue that the Commission's decision to retain restrictions on the common ownership of newspapers and broadcast stations contravenes the First Amendment because it limits the speech opportunities of newspaper owners and broadcast station owners, and hence limits the public's access to information. Yet again their challenge is foreclosed by *NCCB*, where the Supreme Court affirmed the Commission's authority, despite a First Amendment challenge, to regulate broadcast/newspaper cross-ownership in the public interest. Due to the "physical scarcity" of the broadcast spectrum, the Court scrutinized the regulation to discern a rational basis. 436 U.S. at 799. The Commission's action, it held, was "a reasonable means of promoting the public interest in diversified mass communications." *Id.* at 802.

The Deregulatory Petitioners suggest, as they did in mounting their Fifth Amendment challenge, that the expansion of media outlets since *NCCB*'s day requires a rethinking of the scarcity rationale and the lower level of constitutional review it entails. Again we decline their invitation to disregard precedent, and we are not alone. *See FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 376 & n.11 (1984) (upholding the scarcity rationale until Congress speaks to the issue); *Fox I*, 289 F.3d at 1046 ("First, contrary to the implication of the networks' argument, this court is not in a position to reject the scarcity rationale even if we agree that it no longer makes sense. The Supreme Court has already heard the empirical case against that rationale and still `declined to question its continuing validity.'" (citing *Turner v. FCC*, 512 U.S. 622, 638 (1994))).

Even were we not constrained by Supreme Court precedent, we would not accept the Deregulatory Petitioners' contention that the expansion of media outlets has rendered the broadcast spectrum less scarce. In *NCCB*, the Court referred to the "physical scarcity" of the spectrum—the fact that many more people would like access to it than can be accommodated. 436 U.S. at 799. The abundance of non-broadcast media does not render the broadcast spectrum any less scarce. *See, e.g., Ruggiero v. FCC*, 278 F.3d 1323, 1325 (D.C. Cir. 2002), *rev'd en banc*, 317 F.3d 239 (D.C. Cir 2003) (citing the Commission's statement that "[n]ow . . . radio service is widely available throughout the country and very little spectrum remains available for new full-powered stations.").

In this context, we will apply a rational basis standard to the Commission's restrictions on the common ownership between newspaper and broadcast stations, and uphold them if they are rationally related to a substantial government interest. *See NCCB*, 436 U.S. at 799–800; *see also Am. Family Ass 'n v. FCC*, 365 F.3d 1156, 1168 (D.C. Cir. 2004).

In *NCCB*, the Supreme Court endorsed a substantial government interest in promoting diversified mass communications. *Id.* at 795, 802. The Supreme Court held that the Commission had "acted rationally in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints." *Id.* at 796. Here, as in *NCCB*, the Commission justified its continued restrictions on common ownership of newspapers and broadcast stations as promoting the public interest in viewpoint diversity. *Order* ¶ 355. The Court has said that limiting common ownership is a reasonable means of promoting the public interest in viewpoint diversity. *NCCB*, 436 U.S. at 796. Therefore, applying *NCCB*, we hold that the Commission's continued regulation of the common ownership of newspapers and broadcasters does not violate the First Amendment rights of either.

D. The Commission did not provide reasoned analysis to support the specific Cross-Media Limits that it chose.

The Commission concluded that cross-ownership limits were necessary in specific situations to guard against "an elevated risk of harm to the range and breadth of viewpoints that may be available to the public." *Order* ¶ 442. But recognizing that ownership limits impede the speech opportunities for both broadcasters and newspapers, the Commission endeavored to craft new limits "as narrowly as possible." *Id.* ¶ 441. In that vein, the Commission sought to identify "at risk" local markets—those with high levels of viewpoint concentration—where continued regulation was necessary. By focusing its regulation on those markets, the Commission hoped to avoid needlessly overregulating markets with already ample viewpoint diversity.

But for all of its efforts, the Commission's Cross-Media Limits employ several irrational assumptions and inconsistencies. We do not object in principle to the Commission's reliance on the Department of Justice and

Federal Trade Commission's antitrust formula, the Herfindahl-Hirschmann Index ("HHI"), as its starting point for measuring diversity in local markets. In converting the HHI to a measure for diversity in local markets, however, the Commission gave too much weight to the Internet as a media outlet, irrationally assigned outlets of the same media type equal market shares, and inconsistently derived the Cross-Media Limits from its Diversity Index results. For these reasons, detailed below, we remand for the Commission to justify or modify further its Cross-Media Limits.

1. Overview of the Commission's Diversity Index Methodology

The Commission designed a methodology called the Diversity Index to identify "at risk" markets where limits on cross-media ownership should be retained. The Diversity Index was "inspired by" the HHI, which the Department of Justice and the Federal Trade Commission use to measure proposed mergers' effect on competition in local markets. *Id.* ¶ 394. A market's HHI score is the sum of market shares squared. A highly competitive market will have a lower HHI score than a concentrated one. For example, compare the HHI score of a market with 10 equal-sized competitors (10 [competitors] x 10 [each competitor's market share percentage]^2 = 1000) to the HHI score of a market with only five equal-sized competitors (5 x 20^2 = 2000).[28] The Department of Justice and the Federal Trade Commission categorize markets with HHI scores above 1800 as "highly concentrated." If a proposed merger would exceed that level of concentration, the agencies believe that it would be harmful to the competition in that market. At its core, the

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[28] Of course, the HHI formula also works where the components of a market are not of equal size. In a market where one company controls 50% of the market share, two control 20%, and another controls 10%, the HHI formula is $50^2 + 20^2 + 20^2 + 10^2 = 3400$.

Diversity Index here uses the same sum of market share-squared formula.

First, the Commission selected which media outlets to include in its analysis of viewpoint diversity in local markets based on consumers' reported preferences for sources of local news and information. The Commission determined that broadcast television, daily and weekly newspapers, radio, and Internet (via cable connection and DSL, dial-up, or other connections) are the relevant contributors to viewpoint diversity in local markets. *See* Neilsen Media Research, *Consumer Survey on Media Usage* (MOWG Study No. 8) (Sept. 2002). Based on the popularity of each media source, the Commission assigned each a relative weight: broadcast TV 33.8%, daily newspapers 20.2%, weekly newspapers 8.6%, radio 24.9%, Internet (cable) 2.3% and Internet (DSL, dial-up, or other connection) 10.2%. *Order* ¶¶ 412, 415, 427.

Next, the Commission selected many sample markets[29] for which it would determine a Diversity Index score. In each of those markets, it counted the number of outlets within each media type and assigned each outlet an equal market share. (For example, the New York City market has 23 television stations, so each one was attributed an equal 4.3%[30] market share.) The Commission calculated the ownership share by multiplying the number of outlets owned by an entity by the

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[29] The Commission calculated Diversity Index scores for all markets with five or fewer television stations, all markets with 15 and 20 television stations, and ten randomly selected markets with between six and ten stations. For sample market Diversity Index calculations, see *Order* app. C.

[30] Throughout this discussion of the Diversity Index, we adopt the Commission's convention and report the decimals of intermediate products and quotients (such as 4.3 here) rounded to the nearest tenth. Final products (such as 13.0 reported in the next sentence) are derived from the unrounded intermediate product and then rounded to the nearest tenth.

market share. (Univision owns three television stations in New York, so its ownership share was 3 x 4.3% = 13.0%.) Each ownership share was then given its relative weight by media type. (Univision's 13.0% share was thus subject to the 33.8% multiplier for television stations). The Commission then squared all of the weighted ownership shares; their sum was the market's total Diversity Index score. But in markets with cross-owned shares (outlets of different media types owned by the same entity) the entity's weighted ownership shares were summed together before they were squared. (ABC owned one television station and four radio stations in New York, so the Commission added its weighted ownership share for the television station (4.3% x 33.8% = 1.45%) to its weighted ownership share for the radio stations (6.7% x 24.9% = 1.67%) for a combined ABC ownership share of 3.12%. The square of 3.12 was included in the summation). *See generally Order* app. C.

After the Commission calculated Diversity Index scores for markets of different sizes, it determined how those scores would change in several different consolidation "scenarios." To illustrate, the Commission determined that markets with five television stations had an average Diversity Index score of 911. If a newspaper and television station combined in a market of that size, that score would increase by 223, to 1134. The other combination scenarios were: (1) one television station and all of the radio stations allowed to be commonly owned under the local radio rule; (2) one newspaper and all of the radio stations allowed to be commonly owned under the local radio rule; (3) one newspaper, one television station, and half of the number of radio stations allowed to be commonly owned under the local radio rule; (4) two television stations; (5) one newspaper and two television stations; and (6) one newspaper, two television stations, and all of the radio stations allowed under the local radio rule. *Order* app. D.

Finding that all of the consolidation scenarios resulted in relatively high increases to the average Diversity Index scores for the smallest markets (those with three or fewer television stations), the Commission prohibited newspaper/television, newspaper/radio, and radio/television combinations in those markets. *Order* ¶¶ 456, 459, 460. In the large markets (nine or more stations), all of the consolidation scenarios resulted in acceptable increases to the average Diversity Index scores, so the Commission imposed no limits on cross-media ownership in those markets. In the mid-sized markets (between four and eight television stations), the Commission found that all of the scenarios, except the two involving a newspaper and television duopoly, should be allowed, based on their modest increases to the average Diversity Index scores for those markets. *Id.* ¶ 466.

2. The Commission did not justify its choice and weight of specific media outlets.

Petitioners from both sides of the regulatory spectrum attack the Commission's selection of media outlets for inclusion in the Diversity Index formula. The Citizen Petitioners argue that the Commission gave too much weight to the Internet at the expense of television and daily newspapers, thereby understating the level of concentration and overstating the level of diversity in a market. The Deregulatory Petitioners, on the other hand, argue that the Diversity Index understates the actual amount of diversity in a market by ignoring important media outlets, primarily cable television. As explained below, we affirm the Commission's reasoned decision to discount cable. But we think that the same rationale also applies to the Internet. Therefore, its decision to count the Internet as a source of viewpoint diversity, while discounting cable, was not rational.

The Commission properly excluded cable because of serious doubts as to the extent that cable provided independent local news—the Commission's recognized

indicator of viewpoint diversity in local markets. *Order* ¶ 394 ("News and public affairs programming is the clearest example of programming that can provide viewpoint diversity. . . . [and] the appropriate geographic market for viewpoint diversity is local."). While the responses to one question in the Commission's survey suggested that cable is a significant source of local news, *see MOWG Study No. 8* tbl. 8, the Commission did not find this credible because the responses to other survey questions suggested that respondents were counting broadcast signals that are transmitted as cable channels as sources of local news on cable. *See Id.* tbl. 18 (from a list of popular national cable news channels and a choice for "local cable news channels," almost half of the respondents chose "other" as their source for cable network news, indicating that cable news channels were probably confused with broadcast networks' news). The survey's indication that cable is an independent source of local news was also undercut by external evidence, including Neilsen ratings, that local cable channels are the least watched of any broadcast or cable stations in the market. *Order* ¶ 414. Furthermore, the Commission noted that local cable channels are not available everywhere, but only in select markets. *Id.* ¶ 414 n.924; *see also UCC Comments* at 30–31 (reporting that only 10 to 15% of cable systems include channels that provide local and public affairs programming—*i.e.*, public, educational, and governmental access channels—and that there are only 22 local news cable channels in the country, five of which serve the New York City area). Thus, the Commission justifiably excluded cable from its Diversity Index calculations.

Similarly, the responses to one of the Commission survey questions suggested that the Internet is a source of local news. *See MOWG Study No. 8*[31] tbl.1 (18.8% of respondents

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[31] The dissent suggests that the MOWG Studies, "although not perfect... , are a significant improvement over the study in *Sinclair*" that the D.C.

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listed the Internet as a source of local news). But the survey did not identify which websites respondents used as sources of local news.[32] There is a critical distinction between websites that are independent sources of local news and websites of local newspapers and broadcast stations that merely republish the information already being reported by the newspaper or broadcast station counterpart. The latter do not present an "independent" viewpoint and thus should not be considered as contributing diversity to local markets. Accordingly, the Commission should have discounted the respondents who primarily rely on these websites from its total number of respondents who indicated that they use the Internet to access local news.[33]

Circuit Court determined did not support the Commission's decision to limit the definition of "voices" in its local television rule. But this comparison is not relevant because, as we point out, the Commission inconsistently applied the results of its analysis.

[32] The follow-up question for the respondents who reported using the Internet as a news source asked which sites they had used in the past seven days as a source of local *or national* current affairs, so their responses to this question are not helpful in determining whether the Internet is a source of independent local news. To the extent that we can glean anything from this question—unlikely, as the predominant response was "other" (34.9%)—the most popular websites identified were those of national cable news channels, MSN.com (22.4%) and CNN.com (19.1%), indicating that most people had those types of websites in mind when they reported using the Internet for news. (The other responses were: Yahoo.com (17.9%), MSNBC.com (5.9%), NewYorkTimes.com (5.1%), FoxNews.com (2.2%), USAToday.com (1.8%), ABCNews.com (1.8%), CBSNews.com (1.7%), Netscape.com (1.7%), Excite.com (1.3%), Iwon.com (1.2%), AT&T.net (1.1%), WallStreetJournal.com (1.0%), none (7.3%), don't know (3.5%), and refuse (0.5%)).

[33] The dissent acknowledges the flaws in the *MOWG Study No. 8* survey, but suggests that because the survey "can be fine-tuned on the next round of reviews" it should not be the basis for remand. But we decline to abdicate our obligation to provide meaningful judicial review. Just as the Commission may not rely on a "wait-and-see" approach to rulemaking, *Sinclair*, 284 F.3d at 164, neither can we. We review an agency's

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Furthermore, just as the Commission discounted responses indicating that cable was an independent source of local news because this finding conflicted with other record evidence, it should have discounted the Internet responses as well. The Commission does not cite, nor does the record contain, persuasive evidence that there is a significant presence of independent local news sites on the Internet. According to the record, most sources of local news on the Internet are the websites for newspapers and broadcast television stations. *See, e.g., UCC Comments* at 33 (62% of Internet users get local news from newspaper websites, 39% visit television station websites). And the examples the Commission does cite—the Drudge Report and Salon.com—have a national, not local, news focus.[34] *Order* ¶ 427.

The Commission suggests that "the virtual universe of information sources" on the Internet qualifies it as a source of viewpoint diversity. *Order* ¶ 427. But to accept this rationale we would have to distort the Commission's own premise that local news is an indicator of viewpoint diversity. *E.g., id.* ¶ 391 (Diversity Index measures "the relative importance of these media as a source of local news").[35] Search-engine sponsored pages such as Yahoo! Local and

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decision for whether it is rationally derived from the record evidence—not whether the agency may (or may not) "fine tune" the record at the next mandated review. Furthermore, just as we may not supply a reasoned basis for the agency's action that the agency itself has not given, *State Farm*, 463 U.S. at 43, we also do not supply evidence to an agency in the hopes that the agency will include that evidence in a future study.

[34] Moreover, the Drudge Report is an "aggregator" of news stories from other news outlets' websites and, as such, is not itself normally a "source" of news, national or local.

[35] The Order also speaks of "news and public affairs programming" or "local news and current affairs information" when referring to measures of viewpoint diversity. *E.g., Order* ¶¶ 394, 406, 409.

about.com,[36] which were suggested by commenters as sources of local news and information, may be useful for finding restaurant reviews and concert schedules, but this is not the type of "news and public affairs programming" that the Commission said was "the clearest example of programming that can provide viewpoint diversity." *Id.* ¶ 394.

To accept its "universe of information" characterization of the Internet's viewpoint diversity, we would also have to disregard the Commission's professed intent to focus its consideration of viewpoint diversity on *media* outlets. *Id.* ¶¶ 20, 391. In terms of content, "the media" provides (to different degrees, depending on the outlet) accuracy and depth in local news in a way that an individual posting in a chat room on a particular issue of local concern does not. But more importantly, media outlets have an entirely different character from individual or organizations' websites and thus contribute to viewpoint diversity in an entirely different way. They provide an aggregator function (bringing news/information to one place) as well as a distillation function (making a judgment as to what is interesting, important, entertaining, *etc.*).[37] Individuals (such as political

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[36] The dissent also takes notice of the Independent Media Center websites such as phillyimc.com. We agree that this is a good example of independent local news on the Internet. But the IMC provides local links in only eight markets in the United States. The Commission does not even mention these websites in its analysis of the Internet, let alone argue that IMC websites in eight local markets will offset the viewpoint diversity lost when newspapers and broadcast stations are allowed to consolidate. And even if we believed that to be the case, it is not our role to insert our own analysis to substitute for that which is missing from the agency's rationale. *State Farm*, 463 U.S. at 43 ("[W]e may not supply a reasoned basis for the agency's action that the agency itself has not given.").

[37] See Brief of Petitioner Media General, Inc., at 55 (noting "each media outlet in a community is actually a platform for the expression of many viewpoints").

candidates) and entities (such as local governments or community organizations) may use the Internet to disseminate information and opinions about matters of local concern (such as the extension of a bike path on the Schuylkill River in Center City Philadelphia, see dissent Part IV.A.1), but these individuals and organizations are not, themselves, media outlets. We agree that the Internet "helps citizens discharge the obligations of citizenship in a democracy," *Order* ¶ 393, when someone can go cityofglenfalls.com to find the city council's next agenda or use sfgov.org to learn how to get a marriage license in San Francisco. *See Comments of the Hearst Corporation*, MM Docket No. 01-235 at 11 & n.36, apps. A & C (Dec. 3, 2001) ("*Hearst Comments*") (listing these website addresses, among others, as examples of local government websites). But local governments are not, themselves, "media outlets" for viewpoint-diversity purposes. Like many entities, they just happen to use a particular media outlet—the Internet—to disseminate information.

Similarly, advertiser-driven websites such as hvnet.com and sfadvertiser.com, *see Hearst Comments* at apps. A & C, hardly contribute to viewpoint diversity. Like local governments, the sponsors of these websites are not "media outlets" just because they have "local information" that they want the public to have—if they were, their advertisements in telephone directories would also have to count toward viewpoint diversity. *Compare Order* ¶ 424 (explaining that the Commission would not count toward viewpoint diversity a local newspaper's comics and classified ads because, while the subscriber is "undoubtedly getting a valuable service, it is not clear that the service has anything to do with news and current affairs").

The Commission attempts to justify different treatment for cable and the Internet by suggesting that local cable news channels are only available in select markets, while the Internet is available everywhere. Not only is this distinction

demonstrably false (as even the Commission acknowledged that almost 30% of Americans do not have Internet access, *Order* ¶ 365), it is irrelevant. That the Internet is more available than local cable news channels does not mean that it is providing independent local news. On remand the Commission must either exclude the Internet from the media selected for inclusion in the Diversity Index or provide a better explanation for why it is included in light of the exclusion of cable. *See Sinclair*, 284 F.3d at 163–65 (unexplained inconsistency was arbitrary and capricious).

3. The Commission did not justify its assumption of equal market shares.

Both the Citizen Petitioners and the Deregulatory Petitioners object to the Commission's decision to assign all outlets within the same media type (that is, television stations, daily papers, or radio stations) an equal market share. The assumption of equal market shares is inconsistent with the Commission's overall approach to its Diversity Index and also makes unrealistic assumptions about media outlets' relative contributions to viewpoint diversity in local markets.[38]

The Commission's decision to assign equal market shares to outlets within a media type does not jibe with the Commission's decision to assign relative weights to the different media types themselves, about which it said "we

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[38] The dissent views these flaws, effectively, as "harmless error" because the Commission called the Diversity Index a "useful tool" that "informs, but does not replace, our judgment in establishing rules of general applicability that determine where we should draw lines between diverse and concentrated markets." *Order* ¶ 391. But nowhere in the Order, in its briefs, or in its oral argument did the Commission identify any consideration other than the Diversity Index as having influenced the formulation of the Cross-Media Limits. Rather, the Cross-Media Limits prospectively ban certain combinations in specific markets, and allow others, based on nothing but the relative increases those combinations would have on the average Diversity Index scores of markets of that size.

have no reason to believe that all media are of equal importance." *Order* ¶ 409; *see also id.* 445 ("Not all voices, however, speak with the same volume."). It also negates the Commission's proffered rationale for using the HHI formula in the first place—to allow it to measure the actual loss of diversity from consolidation by taking into account the actual "diversity importance" of the merging parties, something it could not do with a simple "voices" test. *Id.* ¶ 396. Finally, assigning equal market shares to outlets that provide no local news almost certainly presents an understated view of concentration in several markets, thus contravening the Commission's goal of making "the most conservative assumption possible" about viewpoint diversity. *Id.* ¶ 400.

Additionally, there is no dispute that the assignment of equal market shares generates absurd results. For example, in New York City, the Dutchess Community College television station and the stations owned by ABC each receive an equal 4.3% market share. Or compare the Dutchess Community College station's weighted share of 1.5% (4.3% times the 33.8% multiplier for television) to a mere 1.4% weighted, combined share assigned to the New York Times Company's co-owned daily newspaper and radio station. *Order* app. C. A Diversity Index that requires us to accept that a community college television station makes a greater contribution to viewpoint diversity than a conglomerate that includes the third-largest newspaper in America[39] also requires us to abandon both logic and reality.

The Commission's attempt to justify its failure to consider actual market share of outlets within a media type is not persuasive. It suggests that actual-use data use data is not relevant because "current behavior is not necessarily an accurate predictor of future behavior." *Order* ¶ 423. But this truism did not prevent the Commission from preferring

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[39] Source: Audit Bureau of Circulations. *See* http://www.accessabc.com/.

actual-use data in assigning relative weight to the different media types. The Commission also suggests that, compared to consumer preferences for a general media type (which are generally stable), consumers' preferences for particular media outlets are fluid because they depend on the media outlet's chosen format or quantity or quality of content, which are easily changed. *Id.* ¶ 422. But while variance in the local news content of individual media outlets is conceivable—*e.g.*, the home shopping television station *could* start carrying local news—the Commission does not provide any evidence that media outlets *actually undergo* any such radical content change, let alone that they regularly do so. Simply put, the Commission needs to undergird its predictive judgment that stations can freely change the level of their news content with some evidence for that judgment to survive arbitrary and capricious review. *Fox I*, 280 F.3d at 1051.

Lastly, the Commission attempts to justify its refusal to employ actual-use data by arguing that collecting "information on viewing/listening/reading of local news and current affairs material" would make it "necessary first to determine which programming constituted news and current affairs," which in turn "would present both legal/Constitutional and data collection problems." *Order* ¶ 424. With respect to "legal/Constitutional" problems, the Commission is apparently concerned about categorizing programming as news or "non-news." But the Commission obtained actual-use data in MOWG Study No. 8 without any "legal/Constitutional problems." There it avoided having to make content-distinguishing judgments simply by asking respondents where they got their local news. And the Commission's reference here to data collection problems is vague and unexplained; there is no suggestion that obtaining actual-use data for outlets within a media type would be prohibitively more onerous than obtaining the same data for the media types themselves, as it did in MOWG Study No. 8.

Because the Commission's reasons for eschewing actual-use data in assigning market shares to outlets within a media type and assuming equal market shares are unrealistic and inconsistent with the Commission's overall approach to the Diversity Index and its proffered rationale, we remand for the Commission's additional consideration of this aspect of the Order.

4. The Commission did not rationally derive its Cross-Media Limits from the Diversity Index results.

After the Commission calculated the average Diversity Index scores for markets of various sizes, it set out to determine whether the increase in those scores resulting from different consolidation scenarios would have an acceptable or unacceptable effect. The Commission's results, contained in appendix D of the Order, are replicated here for ease of reference. (We have used boldface type to indicate those increases in Diversity Index scores that the Commission found acceptable in crafting the Cross-Media Limits.)

Base Case		Average Change in Diversity Index, Resulting from Mergers						
TV stations in market	Average Diversity Index score	100% Radio + 1 TV station	Newspaper + 100% Radio	Newspaper + 1 TV station	Newspaper + 1 TV station + 50% Radio	2 TV stations	Newspaper + 2 TV stations	Newspaper + 100% Radio + 2 TV stations
1	1707	651	271	910	1321	—	—	—
2	1316	301	335	731	1009	—	—	
3	1027	190	242	331	515	—	—	—
4	928	**138**	**236**	**242**	**408**	—	—	—
5	911	**111**	**263**	**223**	**393**	**91**	376	846
6	889	**79**	**239**	**200**	**340**	**63**	357	688
7	753	**73**	**171**	**121**	**247**	**47**	242	533
8	885	**79**	**299**	**152**	**314**	**36**	308	734
9	705	**64**	**198**	**86**	**207**	**28**	**172**	**473**
10	635	**56**	**107**	**51**	**119**	**23**	**101**	**292**
15	595	**43**	**149**	**48**	**145**	**10**	**97**	**302**
20	612	**49**	**222**	**40**	**128**	**6**	**80**	**350**

As illustrated by the chart's figures that are not in boldface type, the Commission prohibited all cross-media consolidation in the smallest markets where, under any of their sample consolidation scenarios,[40] the increase in Diversity Index would be excessive. The Commission decided to permit all of the scenarios in the largest markets, finding the Diversity Index increases to be acceptable. In the mid-sized markets, the Commission allowed most of the consolidation scenarios but prohibited consolidations involving a newspaper and a television duopoly.

The Deregulatory Petitioners suggest that the Commission should have prohibited only cross-ownership mergers that would lead to an increase of more than 400 points, consistent with the practice of the Department of Justice to block mergers that would increase the local market's HHI score by over 400 points. As illustrated by the chart above, this approach would have generated far more permissive Cross-Media Limits. The Citizen Petitioners argue, on the other hand, that the Commission should have prohibited cross-ownership mergers that lead to an increase of more than 100 points, the increase that triggers the Department of Justice's "further review." But the decision of where to draw the line between acceptable increases and unacceptable increases is almost always the Commission's to make. Deference to the Commission's judgment is highest when assessing the rationality of the agency's line-drawing endeavors. *See NCCB*, 436 U.S. at 814–15; *AT&T Corp.*, 220 F.3d at 627. The Commission rationalized its decision to make conservative assumptions in order to "protect[its] core policy objective of viewpoint diversity." *Order* ¶ 399; *see also Sinclair*, 284 F.3d at 153 (Commission determined that

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[40] The Commission did not report a Diversity Index increase for those scenarios that would be precluded by the modified local television ownership rule, *see generally* Part V *infra*, which would prohibit television station duopolies in markets with fewer than five stations.

antitrust merger guidelines "might be too low as their purpose lay in defining the point at which antitrust scrutiny is required, and not in encouraging a wide array of voices and viewpoints").

Although the Commission is entitled to deference in deciding where to draw the line between acceptable and unacceptable increases in markets' Diversity Index scores, we do not affirm the seemingly inconsistent manner in which the line was drawn. As the chart above illustrates, the Cross-Media Limits allow some combinations where the increases in Diversity Index scores were generally higher than for other combinations that were not allowed. Consider the mid-sized markets (four to eight stations), where the Commission found that a combination of a newspaper, a television station, and half the radio stations allowed under the local radio rule would increase the average Diversity Index scores in those markets by 408 (four stations), 393 (five), 340 (six), 247 (seven), and 314 (eight) points respectively. These permitted increases seem to belong on the other side of the Commission's line. They are considerably higher than the Diversity Index score increases resulting from other combinations that the Commission permitted, such as the newspaper and television combination, 242 (four stations), 223 (five), 200 (six), 121 (seven), and 152 (eight). They are even higher than those resulting from the combination of a newspaper and television duopoly—376 (five stations), 357 (six), 242 (seven), and 308 (eight)—which the Commission did *not* permit. The Commission's failure to provide any explanation for this glaring inconsistency is without doubt arbitrary and capricious, and so provides further basis for remand of the Cross-Media Limits.[41]

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[41] The dissent suggests that the Commission provides sufficient justification in the Order when it explains why the newspaper + 2 TV stations combination is not allowed in midsized markets but the newspaper + 1 TV station + 50% of allowed radio stations combination is

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5. The Commission should provide better notice on remand.

Our decision to remand the Cross-Media Limits also gives the Commission an opportunity to cure its questionable notice. Under the APA, an agency must publish notice of either the terms or substance of the proposed rule or a description of the subjects and issues involved. 5 U.S.C. § 553(b)(3). We have held that "the adequacy of the notice must be tested by determining whether it would fairly apprise interested persons of the `subjects and issues' before the agency." *Am. Iron & Steel Inst. v. EPA*, 568 F.2d 284, 293 (3d Cir. 1977). The Citizen Petitioners argue that, in order to "fairly apprise" the public, the Commission is also obligated to provide notice of its underlying methodology, the reasoning from which it derived the proposed rule. The Commission's notice only indicated that it was considering "creating a new metric" to "reformulate [its] mechanism for measuring diversity and competition in a market," and that it was contemplating "design[ing] a test that accords different weights to different outlet types." *Notice*, 17 F.C.C.R. 18,503, ¶¶ 113-15. The Citizen Petitioners argue that the Commission should have publically noticed the Diversity Index once it determined that was the methodology on which it would rely to derive the Cross-Media Limits. *See McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317 (D.C. Cir. 1988) (failure to describe a particular "model" for computing

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allowed. *Order* ¶ 467 (suggesting that a newspaper will benefit more from the consolidation with its first-acquired TV station than with subsequently acquired stations). But this does not address why the newspaper + 1 TV station + 50% allowed radio stations combination was permitted when its Diversity Index score increases were overall much greater than the Diversity Index score increases for other allowed combinations. In other words, the Commission may have proffered an explanation for why "F" should be treated differently from seemingly similar "D," but it does not explain why "D" should be treated similarly from seemingly different "A," "B," and "C."

contamination levels was not adequate notice); *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 251 (D.C. Cir. 1977) (agency's failure to provide notice of the data from which it derived regulation foreclosed "criticism of the methodology used or the meaning to be inferred from the data").

The Commission argues that the Diversity Index was formulated as a response to comments, and it need not seek additional public comment on data formulated as a response to earlier comments.[42] We are mindful that the APA's notice obligations are not supposed to result in a notice-and-comment "revolving door." "Rulemaking proceedings would never end if an agency's response to comments must always be made the subject of additional comments." *Cmty. Nutrition Inst. v. Block*, 749 F.2d 50, 58 (D.C. Cir. 1984). But courts have also suggested that an agency may withhold notice of its comment-derived data only in the absence of prejudice. *Id.* ("The response may, moreover, take the form of new scientific studies without entailing the procedural consequences appellants would impose, unless prejudice is shown."); *see also Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991) (allowing agency to use "'supplementary' data, unavailable during the notice and comment period, that 'expand[s] on and confirm[s]' information contained in the proposed rulemaking and addresses 'alleged deficiencies' in the pre-existing data, so long as no prejudice is shown" (citing *Cmty. Nutrition Inst.*, 749 F.2d at 57–58) (alteration in original)). As the Diversity Index's numerous flaws make apparent, the Commission's decision to withhold it from public scrutiny was not without prejudice. As the

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[42] The Commission also argues that the Diversity Index was "simply an analytical tool" for measuring diversity. Resp't Br. at 90–91. But as we noted before, *see supra* note 38, it offers no suggestion that anything other than the Diversity Index was used to formulate the Cross-Media Limits.

Commission reconsiders its Cross-Media Limits on remand, it is advisable that any new "metric" for measuring diversity and competition in a market be made subject to public notice and comment before it is incorporated into a final rule.

V. Local Television Ownership Rule

Both the Citizen Petitioners and the Deregulatory Petitioners challenge the Commission's modification to the local television ownership rule, which would allow triopolies in markets of 18 stations or more and duopolies in other markets, subject to a restriction on combinations of the four largest stations in any market. We uphold the top-four restriction but remand the numerical limits for the Commission to harmonize certain inconsistencies and better support its assumptions and rationale. We also remand for the Commission to reconsider or justify its decision to expand the rule's waiver provision—applicable to sales of failed, failing, or unbuilt television stations—by eliminating the requirement that waiver applicants notice the station's availability to out-of-market buyers.

A. Regulatory Background and the 2002 Biennial Review

As part of the 1996 Act, Congress directed the Commission to conduct a rulemaking to determine whether to "retain, modify, or eliminate" its local television ownership rule, which at the time prohibited the common ownership of two television stations with overlapping Grade B signal contours.[43] § 202(c)(2), 110 Stat. 111; *Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and*

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[43] The Commission considers two field-strength contours, Grade A and Grade B, as indicators of a station's approximate extent of coverage over average terrain in the absence of interference. Grade B contours measure a weaker signal than Grade A, and thus have a wider coverage area. 47 C.F.R. § 73.683.

Television Broadcast Stations, 45 F.C.C. 1476, ¶ 3 (1964) (establishing the restriction on the common ownership of televisions stations).

In response to Congress's directive, the Commission promulgated a rule allowing an entity to own two television stations in the same DMA, provided that: (1) the Grade B field-strength contours of the stations do not overlap; and (2) (a) at least one of the stations is not ranked among the four highest-ranked stations in the DMA, and (b) at least eight "voices"—that is, independently owned, operational, commercial or noncommercial full-power broadcast television stations—would remain in the DMA after the proposed combination. *1999 Television Rule Review*, 14 F.C.C.R. 12,903, ¶ 8; 47 C.F.R. § 73.3555(b). The D.C. Circuit Court reviewed this so-called "duopoly rule," and in 2002 remanded it for the Commission to justify its decision to count only broadcast television stations as voices to the exclusion of other non-broadcast media. *Sinclair*, 284 F.3d at 162.

The Commission consolidated *Sinclair*'s remand order with its 2002 biennial review under § 202(h). The Order announced the Commission's decision to abandon the duopoly rule in favor of a rule that would permit common ownership of two commercial stations in markets that have 17 or fewer full-power commercial and noncommercial stations, and common ownership of three commercial stations in markets that have 18 or more stations. Both limits are subject to a restriction[44] on the common ownership of

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[44] Under the new rule, the top-four restriction may be waived on a case-by-case basis. In deciding whether to grant a waiver, the Commission may consider such factors as ratings information demonstrating the competitive effect of the merger, the proposed merger's effect on the stations' ability to transition to a digital signal, and the proposed merger's effect on localism and viewpoint diversity. *Order* ¶¶ 227-30. The top-

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stations ranked among the market's largest four based on audience share. *Order* ¶ 186. The Commission also decided to expand its criteria for waiving the rule's ownership restrictions for proposed combinations that involve failed, failing, or unbuilt stations by eliminating the requirement that waiver applicants provide notice of the sale to out-of-market buyers. *Id.* ¶ 225.

B. We uphold several threshold challenges to the Commission's overall regulatory approach.

Before we consider the specific modifications to the local television rule, we address some threshold challenges to the Commission's regulatory approach.

1. Limiting local television station ownership is not duplicative of antitrust regulation.

We reject the Deregulatory Petitioners' contention that the Commission's local television rule is duplicative of antitrust enforcement (by the Department of Justice and the Federal Trade Commission) and, thus, not in the public interest. The Commission ensures that license transfers serve public goals of diversity, competition, and localism, while the antitrust authorities have a different purpose: ensuring that merging companies do not raise prices above competitive levels. *See, e.g.*, Clayton Act, § 7, 15 U.S.C. § 18 (restraining mergers that would lessen competition in a market); Dep't of Justice and Federal Trade Comm'n, *Horizontal Merger Guidelines* § 0.1 (1997 rev. ed.) ("*Merger Guidelines*") (seeking to protect consumers by ensuring mergers do not result in anticompetitive prices).

The Deregulatory Petitioners contend that the Commission's new regulations are not derived from its professed reliance on audience preference, which the Commission suggests distinguishes its regulatory approach

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four restriction waiver, however, is only available in markets of 11 or fewer stations.

from that of the antitrust authorities. *Order* ¶ 65 (pointing out that it considers audience preferences plus advertising data as indicators of competition, while the antitrust authorities focus on prices). But the Commission's local television ownership rule *does* reflect audience preferences in at least three ways. First, the Commission decided to focus its competition analysis on the delivered program market (as opposed to the video programming market or the video advertising market) because that is the market that "directly affects viewers." *Id.* ¶ 141. Second, as discussed in Part V.0 below, the Commission used audience preference data to support its conclusion that common ownership of local television stations can improve program quality. *Id.* ¶ 150. Third, as also discussed in Part V.C, the Commission justified the top-four restriction on evidence of an audience share "cushion" between the top-four stations and the fifth-ranked station in most markets. *Id.* ¶ 195. Thus, we reject the Deregulatory Petitioners' suggestion that the local television ownership rule does not reflect the Commission's concern for audience preferences.

Finally, we note that the Commission reviews all license transfers, 47 U.S.C. § 310(d), while the antitrust agencies typically review only large mergers. *See* 15 U.S.C. § 18a(a) (a merger must only be reported to the FTC and DOJ if the size of the transaction exceeds $200 million or if the assets of one party exceed $10 million and the assets of the other party exceed $100 million). Eighty-five percent of station mergers that have taken place since 2000 would not have been subject to antitrust review because the parties' assets fell below these thresholds. Br. of Intervenor UCC at 37 (citing BIA Financial Network, *Television Market Report* (2d ed. 2003)). In this context, it hardly seems that the Commission's local television station ownership rule is duplicative of other agencies' antitrust enforcement.

2. Media other than broadcast television may contribute to viewpoint diversity in local markets.

Recognizing that allowing more television concentration in local markets could detract from viewpoint diversity, the Commission rationalized its decision to deregulate with its finding that media other than broadcast television contribute to viewpoint diversity. *Order* ¶ 171. This is a departure from the Commission's rationale for the existing rule—the issue remanded by the *Sinclair* Court—that only television stations are relevant to its diversity analysis.

We agree with the Commission's conclusion that broadcast media are not the only media outlets contributing to viewpoint diversity in local markets. Yet because we remand the Commission's numerical limits, as explained in Part V.D below, we need not decide the degree to which non-broadcast media compensate for lost viewpoint diversity to justify the modified rule. Rather, we leave it for the Commission to demonstrate that there is ample substitutability from non-broadcast media to warrant the particular numerical limits that it chooses on remand.

We note that the record contains only weak evidence that cable can substitute for broadcast television as a source of viewpoint diversity. For example, the Commission found that among cable subscribers (a class that already omits one-third of American households) only 30% have access to local cable news channels. *See Order* ¶ 414 n.924; *see also supra* Part IV.D.2 (describing why the Commission concluded that a majority of survey respondents' purported reliance on cable as a source of local news was probably based on confusion with broadcast news); *Reply Comments of the UCC*, MM Docket No. 01-235 at 5 (Feb. 15, 2002), *UCC Comments* at 30-31. With respect to the Internet, while record evidence indicates a negative correlation between respondents' reliance on broadcast television and the Internet as news sources (suggesting that people who use the Internet for local

news do so at the expense of television), the Internet is also limited in its availability and as a source of local news. *Compare MOWG Study No. 3* at 3, 34; *with UCC Reply Comments at 10 and MOWG Study No. 8* tbl. 097. Therefore, it seems that the degree to which the Commission can rely on cable or the Internet to mitigate the threat that local station consolidations pose to viewpoint diversity is limited.

3. Consolidation can improve local programming.

The Commission supported its decision to relax the existing "eight voices" rule with findings that common ownership of television stations in local markets can result in "consumer welfare enhancing efficiencies" by eliminating redundant expenses and increasing opportunities for cross-promotion and related programming. *Order* ¶ 147. To promote localism, the Commission found that these efficiencies translated into improved local news and public interest programming.[45] *Id.* ¶ 164. Evidence supporting this conclusion included findings that commonly owned television stations are more likely to carry local news than other stations and air a similar quality and quantity of local news as other stations. *See* Bruce M. Owen *et al.*, *Effect of Common Ownership or Operation on Television News Carriage, Quantity and Quality, in Comments of Fox Entertainment Group, Inc. et al.*, MB Docket 02-277 (Jan. 2, 2003). And a study of seven commonly owned broadcast television stations indicates that consolidation generally improved audience ratings—the studied stations increased their audience shares by an average of 3.2% over the share

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[45] This finding is consistent with the Commission's 1999 decision to relax the local television ownership rule because local ownership combinations were likely to yield efficiencies that "can in turn lead to cost savings, which can lead to programming and other service benefits that enhance the public interest." *Order* ¶ 155 (citing *1999 Television Rule Review*, 14 F.C.C.R. 12,903, ¶ 34).

they enjoyed prior to entering into co-ownership with another station. *Order* ¶ 150 & n.295 (citing Mark R. Fratrik, *Television Local Marketing Agreement and Local Duopolies: Do They Generate New Competition and Diversity?* (Jan. 2003), *appendix to Comments of Coalition Broadcasters et al.*, MM Docket 02-277 (Jan. 2, 2003)). In light of this evidence, we reject the Citizen Petitioners' contention that the Commission's finding of localism benefits from consolidation was unsupported.

4. The Commission adequately noticed its decision to allow triopolies.

We also reject the Citizen Petitioners' contention that the Commission failed to provide adequate notice that it was considering a rule that would allow triopolies. The APA requires agencies to publish a notice of proposed rulemaking that contains "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b). The Notice advised parties that any reevaluation of the television ownership rule would take account of the remand ordered by *Sinclair*, which left it to the Commission to reexamine its "voices" test as well as "the numerical limit, given that there is a relationship between the definition of voices and the choice of a numerical limit." *Notice*, 17 F.C.C.R. 18,503, ¶ 76 (citing *Sinclair*, 284 F.3d at 162). Specifically, the Commission asked for comment on "different economic incentives" relating to diverse viewpoints in newscasting that might exist "among stand-alone stations, duopolies, or triopolies." *Id.* ¶ 80. This leaves little doubt that the Notice provided a sufficient "description of the subjects and issues involved" in the Commission's decision to allow triopolies.

C. We uphold the Commission's decision to retain the top-four restriction.

Though the Commission recognized that the combination of television stations within the same market could yield efficiencies that benefit consumers, the Commission also

recognized that station combinations only have an overall public "welfare-enhancing" effect when the consolidation does not create a "new largest" entity. *Order* ¶ 194 (citing, *inter alia*, R. Preston McAfee & Michael Williams, *Horizontal Mergers and Antitrust Policy*, 40 J. Indus. Econ. 181–87 (June 1992)). Thus, the Commission determined that it had to limit allowable station combinations to those that would not create excessive market power in a "new largest" entity. Finding that a significant "cushion" of audience share percentage points generally separates top-four stations from the fifth-ranked stations, the Commission decided that a top-four restriction would ensure that station consolidations did not lead to excessive market power. *Id.* ¶¶ 195-96. The Commission also recognized that efficiencies are less prevalent when financially strong stations merge with each other. *Id.* ¶ 197. For example, top-four stations are already more likely to be originating local news[46] and to have made the transition to digital television. *Id.* ¶¶ 198-99.

The Deregulatory Petitioners assert that the top-four restriction prevents small-market stations from yielding any of the benefits of consolidation. They argue that by effectively precluding any consolidation in markets with fewer than five stations, the Commission deprives the benefit of consolidation from stations—those in small markets—who need it most. But the Commission's local television rule is protective of small-market stations. The numerical limits already allowed, in effect, extra[47] concentration to ensure that

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[46] The Commission found that 85% of top-four stations offer local news programs, as compared to 19% of stations outside the top four. *Order* 198 (citing Bruce M. Owen *et al.*, *News and Public Affairs Programming Offered by the Four Top-Ranked Versus Lower-Ranked Television Stations*, included in *Comments of Fox Entertainment Group, Inc., et al.*, MB Docket 02-277 (Jan. 2, 2003)).

[47] As explained more fully in the next subpart, the Commission justified its numerical limits on the belief that they would ensure six equal-sized competitors in most markets. But the Commission departed from this

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small-market stations would realize the efficiency benefits of consolidation. As for the smallest markets with fewer than five stations—where the top-four restriction operates to preclude any consolidation—it was not unreasonable for the Commission to conclude, as it did, that the detriment of concentrated market power—e.g., reduced incentive to improve programming of mass appeal—outweighed the efficiency benefits. *Id.* ¶¶ 197, 200. And, while we recognize that the Commission "cannot save an irrational rule by tacking on a waiver procedure," *ALL TEL Corp. v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988), we note that the modified rule allows the Commission to waive the top-four restriction in small markets where those consolidations would be beneficial overall.[48]

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rationale when it allowed duopolies in markets with five to eleven stations. *Order* ¶ 201. The Commission explained that stations in those small and mid-sized markets are experiencing greater competitive difficulty than stations in large markets. *Id.* (citing data on the comparative profitability of stations in markets of various sizes). Thus, the Commission determined, it was necessary to allow some additional concentration in those markets (relative to that allowed in the larger markets) so that small and mid-sized market stations would realize the efficiency benefits of consolidation.

[48] The Deregulatory Petitioners challenge the waiver provision as well, suggesting that the Commission's decision to limit its availability to markets with fewer than 12 stations is an arbitrary and capricious number "plucked out of thin air." *See Sinclair*, 284 F.3d at 162. But the Commission explained that its decision to draw the line at markets with fewer than 12 stations was based on its determination that it was in those markets that "the economics of broadcast television justify relatively greater levels of station consolidation." *Order* ¶ 227. Moreover, it is consistent with the Commission's overall approach of maintaining a balance between ensuring that small-market stations can reap the benefits of consolidation while protecting the public's interest in viewpoint diversity. Thus we defer to the Commission's expertise and affirm this particular line-drawing.

We also note that the modified rule does not preclude a top-four restriction waiver in a market with more than 12 stations, as the

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The Deregulatory Petitioners also object to the top-four restriction because, they argue, it unjustifiably treats all top-four ranked stations the same. The essence of their objection is the Commission's finding of a "general separation" between the top-four stations and other stations. They point out that in many markets, especially small- and medium-sized ones,[49] the third- and fourth-ranked stations could combine without exceeding the audience share of the first- or second-ranked stations. Thus, they contend, there is a more substantial "separation" between the third- and fourth-ranked stations than between the fourth- and fifth-ranked stations.[50]

But we must uphold an agency's line-drawing decision when it is supported by the evidence in the record. *Sinclair*, 284 F.3d at 162; *AT&T Corp.*, 220 F.3d at 627. Here there is ample evidence in the record to support the Commission's restriction on combinations among the top-four stations as opposed to the top-three or some other number. The Commission found a "cushion" of audience share percentage points between the fourth- and fifth-ranked stations in most markets. *Order* ¶ 195. Networks' national audience statistics, which are generally reflected in local market rankings of affiliated stations, also show a substantial 60% drop in audience share between the fourth-and fifth-ranked networks. In the ten largest markets, the top-four stations combined control at least 69% (and an average of 83%) of

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Commission expressly acknowledged its duty to give a "hard look . . . to waiver requests." *Id.* 85; *see also* 47 C.F.R. § 1.3 (authorizing waiver of Commission rules "for good cause shown").

[49] In all but 18 of the markets ranked 76 to 201, the combined market share of the third-and fourth- ranked station is less than that of the top-ranked station. *Ex Parte Communication of National Association of Broadcasters*, MB Docket No. 02-277 at 4 (May 22, 2003).

[50] In the largest 150 markets, the fourth-ranked station trailed the third-ranked station by 34% in audience share and 26% in revenue share. Bear, Stearns & Co., Inc., *Duopoly Relief Needed—4th Ranked Stations Significantly Trail 3rd Ranked Stations* (May 29, 2003).

the local commercial share in their respective markets, and in all of the ten largest markets a combination between the third-and fourth-ranked stations would produce a new largest station. *Local Television Ownership and Market Concentration Study, in UCC Reply Comments* at attachment 5.[51] Furthermore, the Commission found that permitting mergers among top-four ranked stations generally leads to large HHI increases.

Thus we conclude that the Commission's decision to retain the top-four restriction is supported by record evidence. Accordingly, we extend deference. *See Sinclair*, 284 F.3d at 162.

D. We remand the specific numerical limits for the Commission's further consideration.

The Commission decided to construct its numerical limits to ensure that most markets would have six equal-sized competitors because the HHI score of a six-member market—1667 ($6 \times (100 \div 6)^2$)—is below the Department of Justice and Federal Trade Commission's 1800 threshold for highly concentrated markets for antitrust purposes. *Order* ¶¶ 192–93 (citing Merger Guidelines § 1.51(c)). Thus the Commission decided to allow triopolies in markets of 18 stations or more ($18 \pm 3 = 6$ equal-sized competitors) and duopolies in markets of 17 or fewer (both limits subject to the restriction on a combination of top-four stations). *Id.* ¶ 193.

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[51] While the likelihood that a third- and fourth-ranked station combination would produce a new largest station was lower in the mid- and small-sized markets, the market share of those markets' top-four stations combined was much higher than in the large markets. *Id.* So while the top-four restriction does not operate to protect the small and mid-sized markets from as many "new largest station" mergers, it furthers diversity by ensuring there are at least four independent voices in those markets.

The Commission's assumption of equal market shares received flak from both ends of the objecting spectrum. The Citizen Petitioners point out that television stations' market shares vary widely and argue that it is arbitrary for the Commission to base its numerical limits on a rudimentary station "head count" of outlets. The Commission's rationale for its triopoly rule requires that we accept a combination of the first-, fifth-, and sixth-ranked stations as the competitive equal of a combination of the 16th-, 17th-, and 18th-ranked stations, just because each combination consists of the same number of stations. While the Citizen Petitioners demonstrate the Commission's flawed rationale with examples of what the modified rule allows, the Deregulatory Petitioners demonstrate the same flaw by pointing out what the modified rule forbids. There is no logical reason, they argue, why it should be impermissible to have five duopolies and one triopoly (a total of six competitors)[52] in a market with 13 stations when it is possible that the triopoly could have a lower combined market share than any or all of the duopolies.

The Commission defends its equal market shares approach with the suggestion that market share, which varies with each season's new programs, is too "fluid" to be the basis for its regulations. *Id.* ¶ 193. But elsewhere in the local television ownership rule the Commission found that the market share was stable enough to rely on for support of its top-four

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[52] The Deregulatory Petitioners also challenge the Commission's six equal-sized competitor benchmark as inconsistent with its five equal-sized competitor benchmark in the local radio rule. *Order* ¶ 289. No reason exists, however, for the Commission's local television ownership limits to mirror precisely its local radio ownership limits, particularly given that there are generally more radio stations than television stations in a given market.

restriction.[53] *Id.* ¶ 195. And not only is the Commission's "market share is too fluid" rationale inconsistent with other aspects of the rule, it is unsupported. The Order cites no evidence to support its assumption that market share fluctuates more in television broadcasting than in other industries. Nor does it refute the Citizen Petitioners' suggestion that this is unlikely to be the case because, unlike most other industries, television station owners face a barrier to market entry (requirement of a license) and the number of market participants (television station owners) is in decline.

The Citizen Petitioners also object to the numerical limits because they allow markets that are already highly concentrated to become even more concentrated. For example, Philadelphia is a market with more than 18 stations, so the modified rule would allow the duopolist Viacom to acquire a third station and potentially increase its audience share from 25% to 34%. Philadelphia's HHI score is already 2037, well above the Commission's 1800 target, and a Viacom triopoly would raise the score to 2487. We acknowledge that the Commission never intended the numerical limits to represent a "mechanical application of the DOJ/FTC Merger Guidelines." *Id.* ¶ 197. But it expressly chose its six equal-sized competitor benchmark to ensure that markets would not exceed the *Merger Guidelines*' 1800 threshold for highly competitive markets.[54] *Id.* ¶ 192. After

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[53] The Commission also defends its rule against charges that it is duplicative of antitrust authority by pointing out that it takes audience preferences into account, unlike antitrust regulators who focus on prices.

[54] The Commission deliberately did not select the Merger Guidelines' 1000 threshold for moderately concentrated markets out of recognition that television stations receive competitive pressure not only from each other but from cable networks as well.

We reject the Deregulatory Petitioners' contention that the Commission's consideration of the competitive effect of cable for this purpose is inconsistent with its refusal to define the relevant competitive market to include cable networks. The Commission explained that cable

(Continued...)

justifying 1800 as the target, the Commission relaxed the local television ownership rule to allow more concentration in markets that already exceed the target—which is not just some markets, but most. *UCC Reply Comments* attachment 5 (28 out of 33 markets studied had HHIs that exceeded 1800, based on 2001 data).[55]

The deference with which we review the Commission's line-drawing decisions extends only so far as the line-drawing is consistent with the evidence or is not "patently unreasonable." *Sinclair*, 284 F.3d at 162. The Commission's numerical limits are neither. No evidence supports the Commission's equal market share assumption, and no reasonable explanation underlies its decision to disregard actual market share. The modified rule is similarly unreasonable in allowing levels of concentration to exceed further its own benchmark for competition (1800)—a glaring inconsistency between rationale and result. We remand the numerical limits for the Commission to support and harmonize its rationale.

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networks offer "almost exclusively . . . national or broadly defined regional programming," and thus profit-maximizing decisions reflect national, rather than local, markets. *Order* ¶ 191. On this ground, the Commission justified its decision not to accept that television and cable compete in the same market. As a matter of degree, however, the Commission recognized that cable networks exerted some competitive pressure on local networks, and thus selected a higher benchmark (1800) than it otherwise might have.

[55] The dissent says that the Commission selected the HHI score of 1800 as a mere "starting point" for its analysis. Dissent Part IV.B. Indeed, the Commission cautioned against "strict, overly simplistic application of the DOJ/FTC Merger Guidelines." *Order* ¶ 192. But the triopoly rule was justified by the six equal-sized competitor rationale, which was in turn derived from the Merger Guidelines' 1800 benchmark. No other rationale was provided. Surely, then, it is proper judicial review to call the Commission on its failure to adhere to the 1800 benchmark it selected.

E. We remand the Commission's repeal of the Failed Station Solicitation Rule.

The Citizen Petitioners also challenge the Commission's repeal of the Failed Station Solicitation Rule ("FSSR"), 47 C.F.R. 73.3555 n.7, which required a waiver applicant to provide notice of the sale to potential out-of-market buyers before it could sell the failed, failing, or unbuilt television station to an in-market buyer.[56] *Order* ¶ 225.

The Commission promulgated the FSSR in its review of the local television rule that Congress had required under § 202(c) of the 1996 Act. To alleviate concerns that its decision to allow duopolies would undermine television station ownership by minorities, the Commission created the FSSR to ensure that qualified minority broadcasters had a fair chance to learn that certain financially troubled—and consequently more affordable—stations were for sale. *1999 Television Rule Review*, 14 F.C.C.R. 12,903, ¶¶ 13-14, 74. In the current Order, however, the Commission does not explain that preserving minority ownership was the purpose of the FSSR, nor does it argue that the FSSR was harmful or ineffective toward this purpose. The only support for its decision to eliminate the FSSR is its prediction that "the efficiencies associated with operation of two same-market

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[56] The proponent of this argument is the Minority Media and Telecommunications Council ("MMTC"), which had participated in the briefing as an intervenor party. On April 7, 2004, MMTC withdrew its petition to the Commission for reconsideration on the same grounds, thus eliminating the jurisdictional bar that otherwise would have precluded our review. *See West Penn Power Co. v. EPA*, 860 F.2d 581, 587 (3d Cir. 1989). We then accepted MMTC's petition for review because its pending reconsideration petition tolled the time for filing a petition for judicial review. *See L.A. SMSA Ltd. P'ship v. FCC*, 70 F.3d 1358, 1359 (D.C. Cir. 1995). MMTC's new status as a petitioner rather than an intervenor negates the Commission's initial concern that MMTC had impermissibly expanded the scope of issues on review by raising an argument that was not addressed in any of the petitioners' briefs.

stations, absent unusual circumstances, will always result in the buyer being the owner of another station in that market."[57] *Order* ¶ 225.

By failing to mention anything about the effect this change would have on potential minority station owners, the Commission has not provided "a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Greater Boston TV Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

Furthermore, while the Commission had promised in 1999 to "expand opportunities for minorities and women to enter the broadcast industry," *1999 Television Rule Review*, 14 F.C.C.R. 12,903, ¶ 4, the FSSR remained its only policy specifically aimed at fostering minority television station ownership. In repealing the FSSR without any discussion of the effect of its decision on minority television station ownership (and without ever acknowledging the decline in minority station ownership notwithstanding the FSSR), the Commission "entirely failed to consider an important aspect of the problem," and this amounts to arbitrary and capricious rulemaking.[58] *State Farm*, 463 U.S. at 43; *see also Copps Dissent*, 18 F.C.C.R. at 13,970-71 (chastising the Commission for "fail[ing] to conduct rigorous analysis of today's rules on minorities and women); *Adelstein Dissent*,

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[57] We fail to see the logic in this proffered rationale. Even if it were true that same-market efficiencies will always lead to a duopoly absent unusual circumstances, it does not follow, without additional proof or explanation, that (1) marketing the station outside the market is a meaningless burden or that (2) the Commission should not retain the FSSR to make that "circumstance" less "unusual."

[58] Repealing its only regulatory provision that promoted minority television station ownership without considering the repeal's effect on minority ownership is also inconsistent with the Commission's obligation to make the broadcast spectrum available to all people "without discrimination on the basis of race." 47 U.S.C. § 151.

18 F.C.C.R. at 13,997 (same). For correction of this omission, we remand.[59]

VI. Local Radio Ownership Rule

Petitioners challenge the Commission's decision to modify its local radio ownership rule, which limits the number of commercial radio stations that a party may own in local markets of different sizes, 47 C.F.R. § 73.3555(a), by, among other changes, adopting a new method for determining the size of local markets. They also argue that the Commission failed to justify its decision to retain the rule's specific numerical limits. We affirm the Commission's decision to modify the rule (including modifying its method for determining local market size), but we agree that its decision to retain the numerical limits was arbitrary and capricious, and hence remand for the Commission's further consideration.

A. Regulatory Background and the 2002 Biennial Review

In 1992 the Commission abandoned its one-to-a-market limit on radio station ownership and implemented tiered numerical limits that allowed for common ownership of as many as six (three AM and three FM) stations—but no more than a combined 25% of the market's total audience share—in the largest markets of 40 or more commercial stations.[60]

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[59] We also note that the Commission deferred consideration of the MMTC's other proposals for advancing minority and disadvantaged businesses and for promoting diversity in broadcasting. *See Order* ¶¶ 49-50 (promising to issue a Notice of Proposed Rulemaking to address the MMTC's thirteen specific proposals); *id.* ¶ 52 (deferring consideration of the MMTC's "Transaction Nondiscrimination" proposal pending recommendations from its Advisory Committee for Diversity). The Commission's rulemaking process in response to our remand order should address these proposals at the same time.

[60] Specifically, the numerical limits provided that:

(1) In markets with fewer than 15 radio stations, a single licensee will be permitted to own up to three stations, no more than two of which

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In 1996 Congress directed the Commission to relax the tiered limits even more, to allow for as many as eight radio stations (but no more than five in the same AM or FM service) to be commonly owned in the largest markets of 45 or more commercial stations.[61] Additionally, Congress required that the Commission review these limits biennially and repeal or modify them as necessary in the public interest. *Id.* § 202(h), 110 Stat. at 111-12.

In its 1998 and 2000 biennial reviews, the Commission decided to retain the same numerical limits enacted by Congress after finding that they continued to be necessary in the public interest. *1998 Biennial Regulatory Review*, 15 F.C.C.R. 11,058, ¶ 59 (2000); *2000 Biennial Regulatory Review*, 16 F.C.C.R. 1207, ¶ 32 (2001). But separately the Commission initiated a proceeding to consider modifying the way in which it "determine[s] the dimensions of radio markets and counts the number of stations in them." *Definition of Radio Markets*, 15 F.C.C.R. 25,077, ¶ 1 (2001). That rulemaking was later consolidated with the 2002 biennial review. *Notice*, 17 F.C.C.R. 18,503, ¶ 7.

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are in the same service, provided that the owned stations represent less than 50 percent of the stations in the market. Common ownership of one AM/FM combination will continue to be allowed in any event.

(2) In markets with 15 to 29 radio stations, a single licensee will be permitted to own up to two AM stations and two FM stations, provided that the combined audience share of the stations does not exceed 25 percent.

(3) In markets with 30 to 39 radio stations, a single licensee will be permitted to own up to three AM stations and two FM stations, provided that the combined audience share of the stations does not exceed 25 percent.

(4) In markets with 40 or more radio stations, a single licensee may own up to three AM stations and three FM stations, provided that the combined audience share of the stations does not exceed 25 percent.

57 Fed. Reg. at 18090.

[61] Congress's 1996 Act-directed limits are set out in full at Part I.F.2 *supra*.

In its 2002 biennial review, the Commission again decided that the numerical limits set by Congress in 1996 remained necessary in the public interest. *Order* ¶ 239. But the Commission changed its method for determining the size of a radio station market. Since the Commission first promulgated tiered numerical limits in 1992, it had defined the markets as the overlapping area of radio stations' coverage. 47 C.F.R. § 73.3555(a)(3)(ii); 57 Fed. Reg. 18,089 (Apr. 29, 1992). For each proposed combination of stations, the local market was defined by "the number of . . . stations whose principal community contours overlap, in whole or in part, with the principal community contours of the stations" that were proposed to be commonly owned. 47 C.F.R. § 73.3555(a)(3)(ii).[62]

Following the 2002 biennial review, the Commission decided to replace this so-called "contour-overlap methodology" with the geography-based market definition used by Arbitron, a private entity that measures local radio station audiences for its customer stations. *Order* ¶¶ 275-76. Within these so-called "Arbitron Metro markets," the number of total radio stations would include both commercial and noncommercial stations that are licensed to a community within the market, as well as stations located outside the market that attract a minimum level of listenership within, *see id.* ¶¶ 279-81, 295. Under the 1996 Act, only commercial stations had counted in determining the size of the market.

Though the Commission decided to grandfather any existing radio station combinations rendered noncompliant by the switch to Arbitron Metro markets, it restricted transfer of those combinations, subject to a limited exception for sales to eligible small businesses. *Id.* ¶ 489.

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[62] The 1996 Act did not define radio markets by any particular methodology.

In an additional modification to the local radio ownership rule, stations under Joint Sales Agreements—as noted earlier, when a licensee authorizes a broker station to sell advertising time on the licensee's station in return for a fee—would be "attributed" to the brokering entity for the purpose of determining the brokering entity's compliance with the applicable limit. *Id.* ¶ 317.

B. We uphold the Commission's new definition of local markets.

Both the Deregulatory Petitioners and the Citizen Petitioners object to the Commission's changes to the way in which it defines a local radio market. Predictably, the Deregulatory Petitioners object to the modification that decreases the size of local markets (using Arbitron Metro markets instead of the contour-overlap methodology)—which potentially lowers the applicable numerical limit in a given market—while the Citizen Petitioners object to the modification that increases the size of local markets (inclusion of noncommercial stations)—which potentially raises the applicable numerical limit in a given market. But we conclude that the Commission has justified these changes under § 202(h) and they are not arbitrary and capricious under the APA.

1. The Commission justified using Arbitron Metro markets.

We reject out of hand the Deregulatory Petitioners' argument that, by changing the market definition methodology, the Commission effectively increased the numerical limits in violation of § 202(h)'s presumption in favor of deregulation. As discussed in Part II above, § 202(h) is not a one-way ratchet. The Commission is free to regulate or deregulate as long as its regulations are in the public interest and are supported by a reasoned analysis. The change to Arbitron Metro markets is both.

Under the existing rule, to determine whether an entity may acquire a radio station under the local radio rule, the Commission first must know how many radio stations are in that station's local market (called the "denominator" figure). The size of the market determines which numerical limit applies. Second, the Commission must determine how many radio stations in that market would be owned by the same entity if the entity acquired the stations it proposes (called the "numerator" figure). If this figure is within the numerical limit, the transaction may proceed.

Under the contour-overlap methodology, the Commission calculates the numerator by counting the acquiring entity's radio stations that *all* have overlapping signal contours. A station whose signal contour overlaps with some but not all of the other stations' contours will not be counted in the numerator. The Commission calculates the denominator by counting all of the stations whose contours intersect with at least one (not all) of the contours of another station in the numerator.

The Commission found that the contour-overlap methodology results in inconsistency between the numerator and denominator figures for a given transaction. Some radio stations owned by the acquiring entity may be counted in the denominator (because their contours intersect with at least one of the numerator-station's contours) but not the numerator (because their contours do not intersect with all of the other numerator-station's contours). An acquiring entity might actually own stations that do not count toward determining how many more it may own within the numerical limit, but do count toward determining the size of the market, where a bigger number correlates to a higher applicable limit. *Order* ¶ 253. The numerator/denominator inconsistency gives rise not only to an artificially low numerator/denominator ratio, which favors combinations but also the potential that combination owners could strategically acquire stations—those whose signals overlap with some, but

not all of their already-owned stations' signals—to end-run the numerical limits altogether. *Id.* ¶ 254. Furthermore, a "perverse incentive" problem arises, as the contour-overlap methodology actually encourages consolidation of powerful radio stations because the stations with larger signals are more likely to create larger markets, which makes it more likely that their owner would be able to acquire even more radio stations in the market. *Id.* ¶ 257.

The Commission determined that it could not fix these problems with the contour-overlap methodology "merely by excluding commonly owned stations from the denominator or including those stations in the numerator." *Id.* ¶ 255. Excluding those stations from the denominator would mean the Commission was determining the size of the market based on who owns the stations, "a distinction that would be both unprincipled and unprecedented in the history of competition analysis." *Id.* On the other hand, including all commonly owned stations that are represented in the denominator could overly inflate ownership levels by including "outlying stations far from the area of concentration." *Id.*

The Commission also found that its transaction-specific market definitions frustrated its ability to benchmark and compute the level of competition in a given area.

Thus it determined that "a local radio market that is objectively determined, *i.e.*, that is independent of the radio stations involved in a particular acquisition, presents the most rational basis for the defining radio markets." *Id.* ¶ 273. For these reasons, the Commission decided to jettison the contour-based methodology and instead employ Arbitron's existing geographical definitions of local markets, finding they are the "established industry standard" that "represent a

reasonable geographic market delineation within which radio stations compete." *Id.* ¶ 276.[63]

As the Deregulatory Petitioners point out, the Commission's reliance on Arbitron Metro markets is not without flaw. One obvious problem is that this method of measure does not cover the entire country. In fact, about 70% of counties in the United States are not within one of the 287 Arbitron Metro markets. But people tend to be clustered in specific population centers, as 78% of the United States' population over the age of 12 lives in Arbitron Metro markets. Nor has the Commission ignored the minority of the public who does not live in Arbitron Metro markets. It initiated a new rulemaking proceeding to develop market definitions for these areas, and in the interim decided to use a modified contour-overlap methodology that "minimize[s] the more problematic aspects of that system." *Id.* ¶ 285.

The Deregulatory Petitioners argue that the Commission failed to demonstrate that the contour-overlap methodology was actually harming competition. One petitioner called the Commission's explanation of the numerator/denominator inconsistency an "exercise in graduate school theoretical economics." Tr. at 394. But the Commission did find evidence of potential competitive harm in a working group study suggesting that station consolidation under the contour-overlap regime has resulted in an increase in advertising prices. *Order* ¶ 261 n.548. And, as described above, the Commission observed that the contour-overlap methodology created a "perverse incentive" problem, as the most powerful stations whose contours intersect more stations (and thus have a larger denominator) are more able than smaller stations to acquire more stations. *Id.* ¶ 257. The

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63 In addition, the Commission noted that the Department of Justice treats Arbitron Metros as the relevant market for antitrust purposes. *Order* ¶ 276.

Commission also found that the contour-overlap methodology impairs its ability accurately to measure and compare competition in consistently defined markets. *Id.* ¶ 259. The Commission's findings provide ample justification for the conclusion that the contour-overlap methodology's resulting inconsistencies are more than just abstract theory.

Next we reject the Deregulatory Petitioners' argument that the Commission improperly departed from its past precedent, namely, its 1992 and 1994 decisions to retain the contour-overlap methodology. *See Revision of Radio Rules and Policies*, 7 F.C.C.R. 6387, ¶¶ 37–40 (1992); *Revision of Radio Rules and Policies*, 9 F.C.C.R. 7183, ¶ 35 (1994). In *State Farm*, the Supreme Court said that when an agency reverses its "former views" it is "obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." 463 U.S. at 41–42; *see also Rust v. Sullivan*, 500 U.S. 173, 186 (1991). Here the Commission supplied a reasoned analysis for the change—that "[i]t was only after the ownership limits were substantially raised in the 1996 Act that the scope of the market distorting effects of that system became manifest." *Order* ¶ 262.

The Deregulatory Petitioners argue that because radio is a signal-based enterprise, any market definition that ignores the actual reach of station signals and the scope of their listenership does not accurately measure competition. But we believe that it was reasonable for the Commission to conclude that fixed, geography-based market definitions more readily enable accurate measurement and comparison of competition than a transaction-specific, contour-based definition. *Id.* ¶ 259.

Finally, the Deregulatory Petitioners point out that Arbitron makes money from its station customers, and it has financial and other obligations to those stations and its shareholders. Therefore, they argue, Arbitron's economic

incentives render its market definitions subject to manipulation. But the Commission recognized these potential problems and adequately established specific safeguards to deter potential manipulation, including a two-year buffer period before any party can receive the benefit of either a change in Arbitron Metro market boundaries or the addition of more radio stations to the market. *Id.* ¶ 278. The Deregulatory Petitioners' suggested conjectural flaws do not persuade us that the Commission's adoption of Arbitron Metro markets was arbitrary and capricious. We also reject their contention that the Commission's use of Arbitron markets delegates governmental power to a private entity. Arbitron will only provide a mechanism for measuring concentration. Because the Commission remains the sole arbiter of whether a proposed radio station combination serves the public interest, no improper delegation will occur.

For these reasons, we conclude that the Commission's decision to replace contour-overlap methodology with Arbitron Metro markets was "in the public interest" within the meaning of § 202(h) and that it was a rational exercise of rulemaking authority.

2. The Commission justified including noncommercial stations.

The Citizen Petitioners object to the Commission's decision to count both noncommercial and commercial stations in determining the size of an Arbitron Metro market.[64] They argue that the inclusion of noncommercial stations increases the number of stations in a given market and thereby allows more consolidation under the numerical limits. It is impermissibly inconsistent, they argue, to

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[64] The Commission included noncommercial stations upon finding that they "exert[] competitive pressure on all other radio stations in the market seeking to attract the attention of the same body of potential listeners." *Order* ¶ 295.

increase effectively the numerical limits in this way while at the same time defending the existing numerical limits from arguments that they should be relaxed. But we reject this argument's factual premise that counting noncommercial stations will increase significantly the number of stations in a given market. Even counting noncommercial stations in the definition of markets, the change to Arbitron Metro markets operates as a net decrease in most markets' size.[65] This undercuts the Citizen Petitioners' argument that it was inconsistent for the Commission to increase the sizes of local markets while justifying the existing numerical limits. It was not arbitrary and capricious, therefore, for the Commission to take account of noncommercial stations in determining the ownership limits.[66]

C. We uphold the Commission's transfer restriction.

In applying its local ownership rules, the Commission decided to grandfather existing radio, television, and radio/television combinations, and did "not require entities to

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[65] In 33 markets of various sizes, investment banking firm Bear Stearns found that there would be an average 47.5% fewer stations under the Commission's adopted approach (that includes noncommercial stations and uses Arbitron Metro markets) than under the existing approach (that excludes noncommercial stations and employs the contour-overlap methodology). In only 6 of the 33 markets studied by Bear Stearns was there an increase in market size under the adopted approach. *See* Bear, Stearns and Co., *A Defining Moment in Radio?*, MB Docket No. 02-277 (May 12, 2003).

[66] We also reject the Citizen Petitioners' contention that Commission failed to provide adequate notice of its decision to include noncommercial stations in its new market definition. The Notice stated that the Commission would engage in a "comprehensive review" of its media ownership rules, including, specifically, whether its competition analysis should focus on "competition for viewers/listeners," "competition for programming," and "competition for advertising." 17 F.C.C.R. 18,503, ¶¶ 50, 52, 57. This language adequately apprised the public that the Commission might find, as it did, that noncommercial stations compete with commercial stations for listeners.

divest their current interests in stations in order to come into compliance with the new ownership rules." *Order* ¶ 484.[67] Under past Commission rules, radio stations created in compliance with the rules were freely transferable under the Commission's policy that maintaining the status quo did not create new harm to public interest goals. *See Revision of Radio Rules and Policies*, 7 F.C.C.R. 6387, ¶ 48. Switching course, in this Order the Commission refused to permit the transfer or sale of grandfathered combinations that violate its local ownership limits except to certain "eligible entities" that qualify as small businesses.[68] *Order* ¶ 488. We reject the Deregulatory Petitioners' arguments that this modification to the local radio ownership rule contravenes § 202(h), constitutes arbitrary and capricious rulemaking, and violates the United States Constitution.

1. Transfer restriction is "in the public interest."

The Commission successfully demonstrates that the transfer restriction is "in the public interest" as required under § 202(h).[69] The Commission notes that forcing

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[67] Though the Commission restricted the transfer of existing combinations rendered noncompliant by all three local rules (Cross-Media Limits, local radio ownership rule, and local television ownership rule), we consider the Deregulatory Petitioners' challenges to the transfer restrictions issue within the context of the local radio rule because the modifications to the local radio rule (*i.e.*, the change to Arbitron Metro markets) are more likely than the deregulatory modifications to the other two local rules to render existing combinations noncompliant.

[68] An eligible entity is a business with $6 million or less in annual revenue. *Order* ¶ 489.

[69] The Deregulatory Petitioners argue that the transfer restriction, as an anti-deregulatory modification, is *per se* invalid under § 202(h). As we explained in Part II, we do not read § 202(h) to impose such a stringent standard for rulemaking. For our review purposes, any modification, whether deregulatory or regulatory, that is "in the public interest" survives threshold scrutiny under § 202(h).

divestitures at the time of transfer "could afford new entrants the opportunity to enter the media marketplace" and "could give smaller station owners already in the market the opportunity to acquire more stations," which would promote the public interest in having competitive and diverse radio markets. *Id.* ¶ 487. Additionally, the Commission found a strong public interest in curtailing the perpetuation of "combinations [that] were created pursuant to a market definition that we conclude fails to adequately reflect competitive conditions." *Id.* Unlike its decision not to require noncompliant combinations to divest, the Commission decided to restrict transfers because it found no "countervailing considerations" (such as the expectancy interests of existing station owners) to outweigh the public interest. *Id.* This rationale satisfies the public interest requirement under § 202(h).

2. Transfer restriction is reasoned decisionmaking.

According to the Deregulatory Petitioners, the transfer restriction is arbitrary and capricious because the Commission "failed to consider an important aspect of the problem"—as required under *State Farm*, *see* 463 U.S. at 43—by ignoring the fact that combination-owners' investments are diminished by the rule. Requiring station combinations to spin off noncompliant stations depresses the price of the station combinations as a whole, which deprives combination-owners (as sellers) of their expected investments. But an agency is not restricted in its rulemaking by the expectations of the regulated. *Borough of Columbia v. Surface Transp. Bd.*, 342 F.3d 222, 236 (3d Cir. 2003) (recognizing that parties who enter the market knowing that the industry is heavily regulated "cannot be said to have been surprised that the [agency's] decisions might thwart its goals"); *see also Sinclair*, 284 F.3d at 166 (upholding a modification to the local television ownership rule "notwithstanding that it may upset some expectations").

The Deregulatory Petitioners also suggest that the Order arbitrarily and capriciously exempted sales to "eligible entities" from the transfer restriction because the Commission did not purport to analyze whether small businesses ($6 million or less in annual revenue) would actually be able to obtain financing necessary to acquire a noncompliant radio station combination. But the rationality of the transfer restriction does not depend on the "eligible entities" exception. It is enough for the Commission to decide, as it did, that when it comes to small business the relative diversity advantages to a market in which an eligible-entity transfer occurred would outweigh the disadvantages to the market's competition interests from the perpetuation of a noncompliant combination. The number of times the exception is invoked is irrelevant to the reasonableness of the transfer restriction as a whole.[70]

3. Transfer restriction is constitutional.

We reject also the Deregulatory Petitioners' suggestion that the Commission's restriction on the transferability of pre-existing noncompliant consolidations "raises serious

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[70] We also reject the Citizen Petitioners' contention that the Commission should have chosen "socially and economically disadvantaged businesses" (SDBs) as the waiver-eligible class instead of Small Business Administration-defined small businesses. It noted that small businesses often include women- and minority-owned stations. *Order* ¶ 488. The Commission noted that, because of pending legislation, the definition of SDBs is currently too uncertain to be the basis of its regulation. *Id.* ¶ 488 n.1042. We anticipate, however, that by the next quadrennial review the Commission will have the benefit of a stable definition of SDBs, as well as several years of implementation experience, to help it reevaluate whether an SDB-based waiver will better promote the Commission's diversity objectives.

constitutional questions"[71] under the Due Process and Takings Clauses of the Constitution's Fifth Amendment.[72]

In order to succeed in a due process or takings case under the Fifth Amendment, the plaintiff must first show that a legally cognizable property interest is affected by the Government's action in question. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) (requiring protected property interest for due process violation); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160—61 (1980) (requiring protected property interest for taking). But broadcast licenses, which are the subject of the Commission's restriction on transferability, are not protected property interests under the Fifth Amendment. *See FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940) ("The policy of the [1936 Communications] Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license."); *see also CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981) (noting that the broadcast spectrum is part of the public domain and that a broadcaster merely has "use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations" (quoting *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966))); 47 U.S.C. § 301 (broadcast licenses provide for the "use . . . but not the ownership" of channels of communication)). Broadcast licensees accept their licenses subject to the Commission's power to regulate their transfer pursuant to "the public

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[71] It is perhaps telling that the Deregulatory Petitioners do not argue that "questions" raised by this aspect of the Order rise to the level of an actual constitutional violation. Br. of Pet'r Clear Channel at 49.

[72] The Fifth Amendment provides, "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. V.

interest, convenience, and necessity." 47 U.S.C. § 310(d). Because a legally cognizable property interest is not implicated by the Commission's decision to restrict the transfer of pre-existing, noncompliant station combinations, a Fifth Amendment violation will not occurr.

D. We affirm the attribution of Joint Sales Agreements.

Under a Joint Sales Agreement ("JSA"), a radio station authorizes a broker to sell advertising time on the station in exchange for a fee. In the Order, the Commission decided to count stations brokered under a JSA toward the brokering station's permissible ownership totals (that is, to "attribute" JSAs), as long as (1) the brokering entity owns or has an attributable interest in one or more stations in the local market, and (2) the joint advertising sales amount to more than 15% of the brokered station's advertising time per week. *Order* ¶ 317. The Commission justified this departure from its prior policy of nonattribution with its finding that in-market JSAs above the 15% threshold convey to the brokering entity a degree of "influence or control" sufficient to warrant limitation under the ownership rules—*i.e.*, a "realistic potential to affect [the brokered station's] programming and other core operating decisions."[73] *Id.* 318. Furthermore, the brokering entity has the ability and the incentive to exercise market power because it controls the advertising revenue of the brokered stations and assumes the financial risks and rewards of advertising. *Id.* ¶ 320. The Commission gave parties to JSAs two years to end their agreements or otherwise come into compliance with the local ownership rules. *Id.* ¶ 325. We reject the Deregulatory Petitioners' arguments that this modification to the local radio ownership rule contravenes § 202(h), constitutes

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[73] In this way, the Commission found that JSAs were no different from their Local Marketing Agreement counterparts under the local television rule, which are attributable. *Id.* ¶ 318.

arbitrary and capricious rulemaking, and violates the Constitution.

1. Attribution of JSAs is "necessary in the public interest."

In the Order the Commission explained that, due to their potential to convey influence to brokering entities, JSAs "may undermine [the Commission's] continuing interest in broadcast competition sufficiently to warrant limitation under the multiple ownership rule." *Id.* ¶ 318. The Commission's decision to modify its attribution policy to "reflect accurately the competitive conditions of today's local radio markets," *Id.* ¶ 321, and thus prevent its local radio rule from being undermined, is a modification "in the public interest" under § 202(h).[74]

2. Attribution of JSAs is reasoned decisionmaking.

An agency that departs from its "former views" is "obligated to supply a reasoned analysis for the change beyond that which may be required in the first instance" in order to survive judicial scrutiny for compliance with the APA. *State Farm*, 463 U.S. at 41-42. Here the Commission acknowledged that its decision to attribute JSAs was a departure from its prior policy of nonattribution, promulgated in 1999. *Order* ¶ 320 n.698. The Commission explained that, "upon reexamination of the issue," it found that JSAs convey the potential for brokering entities to influence the brokered stations; thus a policy of attributing JSAs is necessary to "reflect accurately competitive conditions of today's local radio markets." *Id.* ¶¶ 320, 321.

The Deregulatory Petitioners argue that this proffered rationale is insufficient because the Commission does not

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[74] Again we reject the Deregulatory Petitioners' arguments that, as an anti-deregulatory modification, this aspect of the Order is a *per se* violation of § 202(h). *See supra* Part II.B.

explain what, if anything, transpired since 1999 that accounts for its change of position. But because we interpret the Commission's modification as a correction of its prior policy's "inaccuracy," the Commission's failure to cite a particular intervening change is not fatal to its reasoned analysis. In this context we accept that the Commission's determination—upon "reexamination of the issue" that the JSAs convey (and always have conveyed) a potential for influence—sufficiently rationalizes its decision to jettison its prior nonattribution policy and replace it with one that more accurately reflects the conditions of local markets.

3. Attribution of JSAs is constitutional.

We also disagree with the Deregulatory Petitioners' suggestion that the attribution of JSAs "raises serious constitutional concerns"[75] under the Fifth Amendment's Takings Clause. Contracts such as JSAs are protected property interests under the Fifth Amendment, see *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977), but here the Commission has not invalidated or interfered with any contracts. In deciding to attribute JSAs, it is has simply decided that stations subject to JSAs should, in certain circumstances, count toward the regulatory limit in determining how many stations the brokering entity may own in a market. Moreover, station owners have no vested right in the continuation of any particular regulatory scheme. *Folden v. United States*, 56 Fed. C1.43, 61 (2003) (parties "in a highly regulated field such as FCC licensing can have no distinct investment-backed expectations that include a reliance upon a legislative and regulatory status quo"); cf. *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 222–27 (1986) (no regulatory taking occurred because government had not appropriated property for its own use,

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[75] Again it is telling that the Deregulatory Petitioners do not argue that "concerns" raised by this aspect of the Order rise to the level of an actual constitutional violation. Br. of Pet'r Clear Channel at 58.

did not impose a severe economic impact, and did not interfere with reasonable expectations). Thus we reject the Deregulatory Petitioners' suggestion that the attribution of JSAs will result in a regulatory taking.

E. We remand the numerical limits to the Commission for further justification.

In the Order, the Commission announced its decision to retain the existing numerical limits on radio ownership that Congress established in § 202(b) of the 1996 Act. The existing limits preclude the common ownership of radio stations with overlapping principal community contours, except that: (1) in a radio market with 45 or more commercial radio stations, a party may own up to eight commercial radio stations, not more than five of which are in the same service (that is, AM or FM); (2) in a radio market with between 30 and 44 commercial radio stations, a party may own up to seven commercial radio stations, not more than four of which are in the same service; (3) in a radio market with between 15 and 29 commercial radio stations, a party may own up to six commercial stations, not more than four of which are in the same service; and (4) in a market with 14 or fewer commercial radio stations, a party may own up to five commercial radio stations, not more than three of which are in the same service, except that a party may not own more than 50 percent of the stations in that market. 1996 Act, § 202(b)(1), 110 Stat. at 110; 47 C.F.R. § 73.3555(a)(1).

First, the Commission defended its use of numerical limits from those commenters who argued that there should be no limits at all on local radio station ownership. The Commission explained that radio is a closed-entry market, *i.e.*, all available radiofrequency spectrum has been licensed. So the only way to develop market power is to buy existing stations. Thus, the Commission says, numerical limits are a reasonable way of preventing available capacity from being "locked up" in the hands of a few owners. *Order* ¶ 288.

The Commission then explained that the specific numerical limits that it currently employs are effective to this end. Citing economic literature, the Commission suggested that a market with five equal-sized competitors is a sufficiently competitive market. The existing limits allow for roughly five equal-sized firms in each market. (For example, the eight-station limit for markets of 45 or more stations allows for five eight-station combinations). *Id.* ¶ 289. The Commission concluded that the existing limits ensure sufficiently competitive local markets.[76] The Commission also concluded that the existing limits are not overly restrictive based on data showing that the top-four stations in each metro market are thriving in terms of revenue and audience share. *Id.* ¶ 290.

As explained in Part II.B above, § 202(h) operates to extend the "reasoned analysis" requirement (which ordinarily applies only to an agency's decision to promulgate new regulations or modify existing ones) to apply also to the

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[76] The Commission also explained why the numerical limits depart from the five equal-sized competitor rationale. Of its decision not to adopt a 10-station limit for markets with 50 or more stations, the Commission said that it found no evidence that additional consolidation would increase efficiencies in those markets. Furthermore, the Commission said that the largest markets usually have many small, low-power stations, which make those markets appear more competitive than they actually are. A numerical limit that ensures even more than five equal-sized competitors in these largest markets provides a competition-protecting cushion that compensates for this. *Order* ¶ 291. The Commission also realized that its numerical limits for the smaller market tiers also depart from the five equal-sized competitor rationale. It maintained that, in small markets, "greater levels of concentration may be needed to ensure the potential for viability of radio stations." *Id.* ¶ 292.

As explained below, we believe that the numerical limits lack a rational underpinning in the "five equal-sized competitor" theory the Commission advanced. But because we remand for further justification by the Commission, we do not address Petitioners' arguments regarding the Commission's departure from the five equal-sized competitor rationale.

Commission's decision to retain existing regulations. Although we accept the Commission's rationale for employing numerical limits (as opposed to other regulatory approaches such as a caseby-case analysis), we conclude that the Commission's decision to retain the specific numerical limits is not supported by a reasoned analysis.

1. The Commission's numerical limits approach is rational and in the public interest.

The Commission's decision to retain a numerical limits approach to radio station ownership regulation is "in the public interest." Without numerical limits, radio markets risk becoming "locked up" in the hands of a few owners (or even one owner) because all of the available radiofrequency spectrum has been licensed—a high barrier to new market entrants. *Order* ¶ 288. Based on record evidence, the Commission justifiably concluded that numerical limits are necessary "to guard against consolidation . . . and to ensure a market structure that fosters opportunities for new entry into radio broadcasting." *Id.* ¶ 291. For example, a MOWG study found that, since the existing limits were imposed in 1996, the number of radio station owners declined by 34% even though the number of stations increased by 5.4%. George Williams & Scott Roberts, *Radio Industry Review 2002: Trends in Ownership, Format, and Finance* (MOWG Study No. 11) at 3 (Sept. 2002). Additionally, the record shows that today 10 parent companies—the largest of which, Clear Channel Communications, owns 1200 stations nationwide, or 10%—dominate the radio industry and control about two-thirds of both listeners and radio revenues nationwide. *Id.* at 4. In contrast, prior to the 1996 Act's deregulation, the largest nationwide radio station combinations had fewer than 65 stations each. *Id.*

Furthermore, the record shows how increased consolidation has increased station prices, which limits opportunities for new market entrants and as a result limits

diversity in station ownership and output. *UCC Comments* at 18. Consolidation has also reduced the amount of locally produced radio content, as large group-owners often broadcast remotely from national offices instead of having local employees produce programming. *Comments of Future of Music Coalition*, MB Docket 02-277 at 13-14 (Nov. 20, 2002). The record contains examples of consolidated stations that eliminated local news production. *UCC Comments* at 37-38. The evidence thus supports the Commission's conclusion that, by continuing to limit the consolidation of radio stations, numerical limits are "in the public interest" as required under § 202(h).

2. The Commission did not support its decision to retain the existing numerical limits with reasoned analysis.

Both the Citizen Petitioners and the Deregulatory Petitioners argue that the Commission's decision to retain the existing numerical limits was arbitrary and capricious. Predictably, the Citizen Petitioners argue that the Commission should have tightened the existing limits, and the Deregulatory Petitioners argue that the Commission should have relaxed them. But both sides' predominant argument is essentially the same: the numerical limits are not supported by the Commission's theory that they ensure five equal-sized competitors in most markets. While, as discussed above, substantial evidence supports the Commission's decision to retain the numerical limits structure of its local radio ownership rule, we also agree with the Petitioners that the Order lacks a reasoned analysis for retaining these specific numerical limits. We thus remand for the Commission's additional justification.

a. The Commission did not sufficiently justified "five equal-sized competitors" as the right benchmark.

The Commission relied on game theory to support its premise that five equal-sized competitors ensure that local

markets are fragmented and structurally competitive. *Order* 289 n.609 (citing Louis Phillips, Competition Policy: A Game Theory Perspective Ch. 2 (1995); Timothy F. Bresnahan & Peter C. Reiss, *Entry and Competition in Concentrated Markets*, 99 J. Pol. Econ. 997 (1991); Reinhard Selten, *A Simple Model of Imperfect Competition Where Four Are Few and Six Are Many*, 2 Int'l J. Game Theory 141 (1973)). The Citizen Petitioners and the Deregulatory Petitioners both dispute that these articles support the Commission's selection of five equal-sized competitors as the appropriate benchmark. The Deregulatory Petitioners argue that the articles fall short because they do not rule out market structures other than equal-sized competitors (such as one large firm and many small ones) as equally competitive markets. This argument, unanswered by the Commission, warrants a response because (as discussed below) the record evidence supports neither actual nor potential existence of equal-sized competitors.

The Citizen Petitioners argue that the three articles the Commission cites are superseded and contradicted by the Department of Justice and Federal Trade Commission's most recent re-write of the Merger Guidelines, under which a market with five equal-sized competitors is considered "highly concentrated." *See Merger Guidelines* § 1.51(c) (a highly concentrated market has an HHI score higher than 1800). The Commission's decision to rely on theory that conflicts with the Merger Guidelines is suspect because, in the same Order, the Commission relied on the Merger Guidelines to derive its new limits for local television station ownership. *See Order* ¶¶ 192-93. The Commission did not address this discrepancy in its Respondent's Brief,[77] and should do so on remand.

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[77] The Commission argued instead that we should defer to its line-drawing discretion. But in order to warrant judicial deference, an

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b. The Commission did not sufficiently justified that the existing numerical limits actually ensure that markets will have five equal-sized competitors.

Regardless whether five equal-sized competitors is the right benchmark for competition, the Commission did not sufficiently justified that five equal-sized competitors would emerge or actually have emerged under the numerical limits. It defies logic to assume that a combination of top-ranked stations is the competitive equal to a combination of low-ranked stations just because the two combinations have the same number of stations. The Commission itself acknowledges that "radio station groups with similar numbers of radio stations [can] have vastly different levels of market power." *Order* ¶ 290.

Furthermore, evidence shows that the existing numerical limits do not ensure five equal-sized competitors. According to the record, most markets are dominated by one or two large station owners.[78] And the top-four station owners

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agency's line-drawing decision must be justified by a reasonable explanation and cannot run counter to the evidence before it. *Sinclair*, 284 F.3d at 162; *see also* NCCB, 436 U.S. at 814-15. On this aspect of the Order, the Commission's decision is neither.

[78] *The Local Radio Market Concentration Study*, submitted with comments of the UCC to MM Docket No. 01-317 (Mar. 26, 2002), supports this conclusion. The UCC studied 33 local radio markets (using 2001 data from the BIA Financial Network) of various sizes and reported each market's four largest station owners' local commercial share. In most, the largest and second-largest station owners had market shares considerably higher than the next largest owners. For example, in San Francisco the top two station owners controlled, respectively, 26.8% and 20% of the local commercial share; the third- and fourth-largest owners controlled 13.4% and 12.1%, respectively. In Atlanta, the largest station owner had a 30.8% market share while the owners of the three next-largest stations had between 9% and 17% each. Medium and small markets were also dominated by one or two owners. The four largest station owners in Jacksonville, Florida owned 45.5%, 36.3%, 9.1%, and

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together control the lion's share of the market.[79] Even if these four station-owners were "equal-sized" (they are not), the HHI score of such a market would be 2500 (4 x (100 ÷ 4)^2), well above the Merger Guidelines' 1800 threshold for highly concentrated markets.

The Commission does not explain why it could not take actual market share into account when deriving the numerical limits.[80] Had it proffered the "market share is too fluid" rationale, we have already rejected that explanation in the context of the local television ownership rule and the Cross-Media Limits. We also note that the Commission has in the past extolled the value of audience share data for measuring diversity and competition in local radio markets.[81] So the

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2.5%. The four (only) station owners in Fargo, North Dakota owned 50.8%, 40.2%, 7.0%, and 2.0%.

[79] *See id.* In all but one of the 11 of the 50 largest markets analyzed by the UCC, the four largest firms controlled between 64 and 82% of the market share. In its 15 mid-sized markets, four largest firms controlled between 86 and 100% of the market share. And in the seven small markets it studied, the four largest firms controlled between 92 and 100% of the market share.

[80] The dissent suggests that this conclusion is undermined by two paragraphs in the Order, ¶¶ 300-01, in which the Commission justified its decision not to reinstate an audience share cap on mergers. But the flaw we find in the Commission's analysis has nothing to do with its conclusion that an audience share cap would discourage radio stations from earning market share by investing in quality programming. *Order* ¶ 300. Our concern is, rather, that the Commission sought to justify its numerical limits by suggesting that they would allow a sufficient number of equal-sized competitors (five) to allow for a competitive market, when in fact there is no evidence that the resulting competitors would be anything approaching "equal-sized."

[81] In the context of its decision in its 1992 rulemaking to retain a 25% audience share benchmark at which an acquisition will raise a *prima facie* concern that the transaction will lead to undue local concentration, the Commission said:

> We recognize that there are some limitations to relying exclusively on market share data to weigh

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Commission's reliance on the fiction of equal-sized competitors, as opposed to measuring their actual competitive power, is even more suspect in the context of the local radio rule.

For these reasons, the Commission's numerical limits cannot rationally be derived from a "five equal-sized competitor" premise. We thus remand for the Commission to develop numerical limits that are supported by a rational analysis.

c. The Commission did not support its decision to retain the AM/FM subcaps.

The Deregulatory Petitioners challenge the Commission's decision to retain the AM/FM subcaps, which the Commission justified on the grounds that FM stations have technological and economic advantages over AM stations. *Order* ¶ 294. But the Deregulatory Petitioners point out, and we agree, that this does not explain why it is necessary to impose an AM subcap at all. The Commission does not

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> concentration in the local radio marketplace, as pointed out by petitioners. However, to the extent petitioners argue that ratings data are inherently unsuitable for purposes of analyzing local concentration, we disagree. We believe that audience share information will be useful in helping to measure diversity and competition. Specifically, audience share data can identify the most dominant stations in a market. And, compared to limits based solely on the number of stations involved, use of audience share is a means of accounting for the variety of types of stations—clear channel, regional, daytime, low and high power—that exist in various markets. Moreover, by continuing to consider this factor as part of our ownership limits, our rules may provide an incentive for stronger, successful stations to invest in other local stations with generally low audience shares—an outcome that is consistent with the purposes of this proceeding.

Revision of Radio Rules and Policies, 7 F.C.C.R. 6387, ¶ 47.

respond in its brief to this particular criticism. Thus it should do so, or modify its approach, on remand.

VII. Conclusion

Though we affirm much of the Commission's Order, we have identified several provisions in which the Commission falls short of its obligation to justify its decisions to retain, repeal, or modify its media ownership regulations with reasoned analysis. The Commission's derivation of new Cross-Media Limits, and its modification of the numerical limits on both television and radio station ownership in local markets, all have the same essential flaw: an unjustified assumption that media outlets of the same type make an equal contribution to diversity and competition in local markets. We thus remand for the Commission to justify or modify its approach to setting numerical limits. We also remand for the Commission to reconsider or better explain its decision to repeal the FSSR.[82] The stay currently in effect will continue pending our review of the Commission's action on remand, over which this panel retains jurisdiction.

SCIRICA, *Chief Judge*, dissenting in part, concurring in part.

Although I concur in some parts of the Court's comprehensive analysis of this complex agency order, including its rejection of the constitutional challenges, I respectfully dissent from its decision to vacate and remand. In my view, the Court's decision has upended the usual way the judiciary reviews agency rulemaking. Whether the standard is "arbitrary or capricious," "reasonableness," or some variant of a "deregulatory presumption," the Court has applied a threshold that supplants the well-known principles of deference accorded to agency decision-making. In so

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[82] On remand the Commission should also consider MMTC's proposals for enhancing ownership opportunities for women and minorities, which the Commission had deferred for future consideration.

doing, the Court has substituted its own policy judgment for that of the Federal Communications Commission and upset the ongoing review of broadcast media regulation mandated by Congress in the Telecommunications Act of 1996.

I would lift the stay and allow the Commission's media ownership rules to go into effect. It is not the role of the judiciary to second-guess the reasoned policy judgments of an administrative agency acting within the scope of its delegated authority. Allowing the biennial (now quadrennial) review process to run its course will give the Commission and Congress the opportunity to monitor and evaluate the effect of the proposed rules on the media marketplace. More importantly, it will ensure that accountability for these crucial policy decisions rests with the political branches of our government.

I. Introduction

In 1934, Congress delegated broad authority to the Federal Communication Commission to regulate "interstate and foreign commerce in communication by wire and radio," and to grant station broadcast licenses that served "public convenience, interest, and necessity." Communications Act of 1934, 47 U.S.C. §§ 151, 309(a). This statutory authority to regulate broadcast media is girded by an obligation "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969). The FCC's delegated responsibility to foster a robust forum for national debate is unique in administrative law and essential to the vibrancy of our deliberative democracy. *See Buckley v. Valeo*, 424 U.S. 1, 49 (1976) ("Democracy depends on a well-informed electorate.").

Preserving the "marketplace of ideas" does not easily lend itself to mathematical certitude. While other independent federal agencies may act with greater measurable precision in reducing pollution emissions, defining safety standards or even establishing interest rates, the FCC operates in the less

scientific arena of speech and debate.[83] In this realm, the Commission's mandate to maintain viewpoint diversity in the national broadcast media is complicated both by the "elusive" concept of diversity,[84] and by the inherent uncertainty regarding the prospective effects of structural rules.[85] Even the direct regulation of specific broadcast content—e.g., content guidelines for news and public affairs programming—does not necessarily assure viewpoint diversity will be achieved.

The Commission's duty to regulate broadcast media in the public interest is further complicated by the unpredictable impact of emerging technologies on the media marketplace. When the Commission was first formed, AM or "standard" radio was the only broadcast medium of practical concern. *See 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 F.C.C.R. 13,620, 13,649-651 ¶¶ 90-94 (2003) ("*Order*") (detailing history of the modem media marketplace). Today, the modem media marketplace includes literally thousands of radio and broadcast television stations, hundreds of national, regional and local non-broadcast television networks delivering a vast range of content over cable and direct broadcast satellite systems, and perhaps most significantly, the Internet and a host of digital technology-

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[83] *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (describing the theory of free speech as "an experiment, as all of life is an experiment").

[84] *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 796-97 (1978) ("*NCCB*") ("[Diversity] and its effects are . . . elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds.") (citation omitted).

[85] *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 96 (1953) ("the possible benefits of competition do not lend themselves to detailed forecast").

enabled interactive services. *Id.* ¶¶ 95-128. In designing media ownership rules for this dynamic technological landscape, the Commission must balance the potentially negative effects of license ownership concentration on programming diversity against the economic viability of new or struggling media outlets.

Over the past seventy years, the Commission has actively adjusted its license ownership rules on an ongoing basis to foster the growth of new media outlets while maintaining a focus on programming diversity. For much of its early history, the Commission operated with the assumption that diversification of ownership best served the public interest in promoting programming diversity.[86] For example, in 1938 the Commission denied Genesee Radio Corporation's application for a second AM station license after concluding it was "not in the public interest to grant the facilities for an additional broadcast station to interests already in control of the operation of a station of the same class and in the same community." *Genesee Radio Corp.*, 5 F.C.C. 183, 186 (1938). For the next forty years, media regulation continued primarily "on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power."[87] *NCCB*, 436 U.S. at 780.

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[86] *See generally* Bruce M. Owen, *Regulatory Reform: The Telecommunications Act of 1996 and the FCC Media Ownership Rules*, 2003 Mich. St. DCL L. Rev. 671 (Fall 2003).

[87] *See, e.g., Rules Governing Standard and High Frequency Broadcast Stations*, 5 Fed. Reg. 2382, 2384 (June 26, 1940) (FM radio); *Rules Governing Standard and High Frequency Broadcast Stations*, 6 Fed. Reg. 2282, 2284-85 (May 6,1941) (television); *Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations*, 22 F.C.C.2d 306, 307-08 5-8 (1970) (proscribing common ownership of more than one full-time broadcast station (radio or TV); *Amendment of*

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The Commission has departed from this baseline presumption when strict adherence to a policy of ownership diversity threatened to drive some media outlets from the market. For example, in the early 1970s, the Commission relaxed its "one-to-a-market" rule to permit co-ownership of AM and FM licenses in the same market after observing that most AM-FM combinations were "economically and/or technically interdependent," and that most free-standing FM stations were not economically viable without a co-owned AM license revenue. *See Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership Rules of Standard, FM and Television Broadcast Stations*, 28 F.C.C.2d 662, 671 ¶ 33 (1971). The Commission similarly permitted UHF-radio combinations on a case-by-case basis to encourage the development of the UHF broadcasting medium. *Id.* at 674. Likewise, in repealing national ownership caps for television and radio, the FCC concluded the potential economic efficiency gains from "group ownership actually further[], rather than frustrate[], the foremost First Amendment goal of augmenting popular discussion of important public issues." *Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations*, 100 F.C.C.2d 17, 20 (1984).

The dynamic evolution of the media ownership rules—with the Commission intermittently encouraging and discouraging economic concentration—demonstrates the virtual impossibility of drafting a single, static regulatory structure that consistently serves the public interest for an extended time period. The Commission's statutory mandate

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Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard FM, and Television Broadcast Stations, 50 F.C.C.2d 1046 (1975), *amended on reconsideration*, 53 F.C.C.2d 589 (1975) (prohibiting broadcast licensees from owning or controlling newspapers in the same geographic markets).

to regulate broadcast media "in the public convenience, interest, and necessity" has been interpreted to require this sort of iterative, if imprecise, rulemaking. *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225 (1943) ("If time and changing circumstances reveal that the `public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations.").

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified this ongoing review process by requiring the Commission to conduct a biennial review of its media ownership rules and "repeal or modify" any rule that no longer serves the public interest. *Id.* at § 202(h), 110 Stat. at 111-112.[88] On the cusp of an unprecedented revolution in communication technologies, Congress set in motion this statutorily-prescribed process of media deregulation based on the conviction that increased competition in the media marketplace would best serve the public interest.[89] The significance of the mandatory review mechanism should not be ignored. This particular set of ownership rules—like any of those passed by the Commission—is not cast in iron. No single set of proposed rules can perfectly capture the dynamic nature of the media marketplace. These rules serve as an important point of reference in an ongoing review process. Nevertheless, the latest rules represent a reasoned

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[88] In the Consolidated Appropriations Act of 2004, Pub. L. 108-199, § 629, 118 Stat. 3, 100 (2004), Congress replaced the biennial review with a quadrennial review.

[89] *See* H.R. Conf. Rep. No. 104-458, at 113 (1996) (defining purpose of the Act "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies to all Americans by opening all telecommunications markets to competition").

step towards the pro-competitive, de-regulatory media ownership framework contemplated by Congress.[90]

Short-circuiting the statutory review process deprives both the Commission and Congress the valuable opportunity to evaluate the new rules and the effects of deregulation on the media marketplace. Under the original implementation schedule, the Commission already would have initiated its assessment of the proposed rules in preparation for the 2004 Biennial Review. *See* Telecommunications Act of 1996 § 202(h). Vacating and remanding the proposed rules to the Commission will preserve the existing rules in place for months or even years,[91] and the resulting delay will likely

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[90] *See* Michael I. Meyerson, *Ideas of the Marketplace: A Guide to the 1996 Telecommunications Act*, 49 Fed. Comm. L.J. 251, 253 (1997) ("The 1996 Act is an experiment, as, one would have to admit, all telecommunication regulation is an experiment.").

[91] The Notice of Proposed Rulemaking process ("NPRM") typically consumes several months. *See, e.g., Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets*, 16 F.C.C.R. 19,861 (2001) (allowing 90-days from publication of notice for comment and reply); *Cross-Ownership of Broadcast Stations and Newspapers, Newspaper/Radio Cross-Ownership Waiver Policy, Order and Notice of Proposed Rule Making*, 16 F.C.C.R. 17,283 (2001) (issuing notice of proposed rulemaking on September 20, 2001, and requiring comment and reply by January 7, 2002). Thereafter, the Commission requires additional time to thoroughly review and evaluate the public commentary gathered through the NPRM. Here, the Commission initiated a comprehensive NPRM on the proposed media ownership rules—which incorporated commentary from previous rulemaking proceedings on the local radio and newspaper/broadcast cross-ownership rules—on September 23, 2002. *See 2002 Biennial Regulatory Review--Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets* ("Notice"), 17 F.C.C.R. 18,503 (2002). The Commission did not issue its final order on the proposed media

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leave the public worse off than if these rules were allowed to take effect.[92]

Given the dynamic nature of the industry, the task of crafting a regulatory structure that reflects the realities of the media marketplace requires the Commission to make predictive judgments about the future. Courts have consistently recognized the Commission's authority and unique expertise in making such estimations. *See Cellco P'ship v. FCC*, 357 F.3d 88, 98 (D.C. Cir. 2004) ("Nothing . . . suggest[s] that under § 11's biennial review mandate the Commission could no longer rely on its predictive judgment or properly-supported inferences in determining to retain a regulation."). Courts also have correctly acknowledged it is virtually impossible for an agency to compile an unchallengeable factual record in support of forward-looking rules designed to anticipate the future development of the marketplace. As the Supreme Court noted, "[i]n such circumstances complete factual support in the record for the Commission's judgment or prediction is not possible or required; `a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.'" *NCCB*, 436 U.S. at 814 (quoting *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961)).

Foremost among the future developments facing the Commission is the explosive growth of the Internet as a media source. The unique qualities of the Internet provide an

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ownership rules until July 2, 2003, some ten months after initiation of the notice and comment process.

[92] The Commission has already been chastised for holding up the process of deregulation so clearly mandated by Congress. *See Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1042 (D.C. Cir. 2002) ("*Fox I*") ("The Commission's wait-and-see approach cannot be squared with its statutory mandate promptly ... to `repeal or modify' any rule that is not 'necessary in the public interest.').

unimaginable breadth of accessible information as well as a forum for individual expression. The Supreme Court recognized the unique nature of this media source when it wrote:

> The Internet . . . offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." 47 U.S.C. § 230 (a)(3) (1994 ed., Supp. V). While "surfing" the World Wide Web, the primary method of remote information retrieval on the Internet today, individuals can access material about topics ranging from aardvarks to Zoroastrianism. One can use the Web to read thousands of newspapers published around the globe, purchase tickets for a matinee at the neighborhood movie theater, or follow the progress of any Major League Baseball team on a pitch-by-pitch basis.

Ashcroft v. ACLU, 535 U.S. 564, 566 (2002) (citations omitted).

By requiring the Commission to craft a set of media ownership rules that perfectly account for the effects of concentration, economic efficiency, diversity and future technological progress, the majority constructs a high bar and impedes the review process established by Congress. Instead of asking the Commission to start from zero, the prudent step would be to allow these reasoned rules to go into effect, monitor the resulting impact on the media marketplace, and allow the Commission to refine or modify its approach in its next quadrennial review. In the interim, if the Commission goes too far or ignores the scope of its statutory mandate, Congress itself may act, as it already has with respect to the national television ownership rules, *see Consolidated Appropriations Act of 2004*, 118 Stat. 3, to modify or repeal any rule it deems to be no longer in the public interest.

There are, of course, alternative approaches the Commission might have taken in crafting the proposed media ownership rules. But the Commission acted within its delegated authority by adopting a set of rules which it properly determined would serve the public interest. Our review of those rules is necessarily cabined within our traditional constitutional role. The courts "must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). Whether or not we agree with this particular set of rules, it is not our role to overturn the Commission's reasoned policy judgments. *See Chevron, U.S.A., Inc. v. Natural Res. Def Council*, 467 U.S. 837, 866 (1984) ("The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: `Our Constitution vests such responsibilities in the political branches.'") (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978)). Questions of media diversity and ownership command strongly divergent views. But those questions should be answered by officials within our legislative and executive branches of government.

II. Standard of Review

This is an appeal of an agency decision under the Communications Act of 1934, 47 U.S.C. § 151 *et seq.* This Court's jurisdiction is based on 47 U.S.C. § 402(a), and 28 U.S.C. § 2342(1). Although there are some similarities, I differ from the majority on the applicable standard of review. Moreover, I believe the majority's subsequent analysis oversteps the appropriate standard. In doing so, the majority substitutes its own judgment for policy decisions meant to be resolved by the Agency.

A.

As noted, Petitioners bring a litany of challenges to the Commission's Order. Different standards of review apply to the various challenges. In reviewing a contention that an

agency rule is arbitrary and capricious, our standard of review is governed first by the Administrative Procedure Act, 5 U.S.C. § 706. Under the APA, this Court is instructed to "hold unlawful and set aside agency action, findings, and conclusions" that are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." § 706(2)(A); *New Jersey Coal. for Fair Broad. v. FCC*, 574 F.2d 1119, 1125 (3d Cir. 1978).

The scope of review under the "arbitrary and capricious" standard is "narrow, and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Nevertheless, in reaching its decision, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Id.* (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). Normally, an agency rule is arbitrary and capricious where:

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given.

Id.; *see also Robert Wood Johnson Univ. Hosp. v. Thompson*, 297 F.3d 273, 280 (3d Cir. 2002). We will, however, "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Motor Vehicle Mfrs. Ass 'n*, 463 U.S. at 43 (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)).

The scope of our review is necessarily influenced by the authority allocated to the FCC in its enabling act. The 1934 Act grants "broad discretion" to the Commission to allocate broadcast licenses in the "public interest, convenience and necessity." *FCC v. WNCN Listeners' Guild*, 450 U.S. 582, 594 (1981). The Act's public interest standard is a "supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *Id.* at 593 (quoting *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940)). The Commission's broad authority suggests that "the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference," and "is not to be set aside" as long as its implementation of the public interest standard is "based on a rational weighing of competing policies." *Id.* at 596.

Finally, the standard of review is even more deferential "where the issues involve 'elusive' and 'not easily defined' areas such as programming diversity in broadcasting." *Sinclair Broad. Group v. FCC*, 284 F.3d 148, 159 (D.C. Cir. 2002). Because many aspects of this administrative order involve policy determinations on such elusive goals, a "rationality" standard is often appropriate. *See NCCB*, 436 U.S. at 796-97 (finding the Commission acted rationally in determining diversification of ownership would enhance the likelihood of achieving diversity of viewpoints). Additionally, where issues involve line-drawing determinations, our review is necessarily deferential to agency expertise, *see AT&T Corp. v. FCC*, 220 F.3d 607, 627 (D.C. Cir. 2000), so long as these decisions do not run counter to the evidence before the agency. *Sinclair*, 284 F.3d at 162.

B.

Several Deregulatory Petitioners challenge the Order as violating § 202(h) of the 1996 Act. This section reads:

> The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.

Because the Order was promulgated as part of the biennial review required by this section, our review is necessarily informed by Congress' direction in the statute that in addition to reviewing its ownership rules biennially to "determine whether any of such rules are necessary in the public interest as the result of competition[,] [t]he Commission shall repeal or modify any regulation it determines to be no longer in the public interest." § 202(h).

This statutory language has been interpreted to correspond with the deregulatory process codified in the 1996 Act. *See Fox I*, 280 F.3d at 1033 (noting that in § 202(h) Congress instructed the Commission to "continue the process of deregulation"); *Sinclair*, 284 F.3d at 159 ("This sentence appears as the last sentence of Congress's instruction that the review of each of its ownership rules every two years `which the court characterized as designed to continue the process of deregulation.') (quoting *Fox I*, 280 F.3d at 1033).

The FCC recognized its heightened burden for maintaining regulations in its Order, noting that "Section 202(h) appears to upend the traditional administrative law principle requiring an affirmative justification for the modification or elimination of a rule."[93] *Order* ¶ 11. The FCC further

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[93] The D.C. Circuit's amendment of *Fox I* in *Fox Television Stations v. FCC*, 293 F.3d 537 (D.C. Cir. 2002) ("*Fox II*"), does not negate the deregulatory flavor of § 202(h).

(Continued...)

recognized the direction from *Fox* and *Sinclair* that "Section 202 carries with it a presumption in favor of repealing or modifying the ownership rules." *Order* ¶ 11; *Fox*, 280 F.3d at 1048; *Sinclair*, 284 F.3d at 159.[94] The FCC must demonstrate that retention of the rules remains in the public interest. *See Fox*, 280 F.3d at 1044 (faulting the Commission for providing no analysis of the state of the television

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In *Fox I*, the D.C. Circuit declared that section 202(h) "is clear that a regulation should be retained only insofar as it is necessary in, not merely consonant with, the public interest." 280 F.3d at 1050. This language was subsequently modified upon petition by the FCC. *Fox II*, 293 F.3d 537. The FCC's petition was denied with regard to interpretation of the word "necessary," however. *Id.* at 540. Instead, the court held that its earlier decision "did not turn at all upon interpreting `necessary in the public interest' to mean more than `in the public interest.'" *Id.* Nonetheless, the court noted that, because the issue was not fully briefed, the meaning of "necessary in the public interest" should be left open. *Id.* The paragraph interpreting "necessary in the public interest" in *Fox I*, 280 F.3d at 1050, was rewritten to read:

> Next, Time Warner argues that the Commission applied too lenient a standard when it concluded only that the CBCO Rule "continues to serve the public interest," . . . and not that it was "necessary" in the public interest. Again the Commission is silent, but nonetheless we do not reach the merits of Time Warner's argument. This important question was barely raised by the petitioners and was not addressed at all by the Commission or the intervenors. Even if "necessary in the public interest" means simply, "continues to serve the public interest," for all the reasons given above and below, the Commission's decision not to repeal or to modify the NTSO and the CBCO Rules cannot stand.

293 F.3d at 541. This language, leaving open the meaning of "necessary in the public interest," does not alter the effect of § 202(h) on our standard of review.

[94] The majority found the Commission's interpretation of § 202(h) misguided. I believe the Commission adequately articulated the standard in its Order. I do not find the Commission's statements about its burden under §202(h) to significantly alter the standard of review expressed in this section.

broadcast market in maintaining the National Television Ownership Rule). As noted at the outset, this requirement does not preclude the FCC from relying on predictive judgments and expertise in crafting its rules. *See id.* at 1051 (noting that the "court should ordinarily defer to the Commission's predictive judgments"). The Commission's authority to rely on predictive judgments and empirical assumptions was recently affirmed by the Court of Appeals for the D.C. Circuit. *See Am. Family Ass 'n, Inc. v. FCC*, Nos. 00-1310, 2004 U.S. App. LEXIS 9150, *23 (D.C. Cir. May 11, 2004) (noting "necessarily wide latitude to make policy based on predictive judgments deriving from [the Commission's] general expertise").

At issue on the § 202(h) standard of review is whether and to what extent the presumption to repeal or modify ownership rules turns on the definition of the term "necessary." The FCC interpreted "necessary" in § 202(h) to mean "useful," "convenient" or "appropriate" rather than "required" or "indispensable." 18 F.C.C.R. 4726, 4730-36 (March 14, 2003); *Order* ¶ 11 n.15 (citing same). The FCC's interpretation of "necessary" is correct.[95] The term "necessary" in statutes has been found repeatedly to mean "useful" or "appropriate" rather than "indispensable." 18 F.C.C.R. at 4731 n.24 (citing, *inter alia, Morgan v. Commonwealth of Va.*, 328 U.S. 373, 377-78 (1946)); *see also Cellco*, 357 F.3d at 99.

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[95] Courts have recognized that *Chevron* standards apply to judicial review of the Commission's interpretation of the Communications Act. *See Cellco*, 357 F.3d at 94. Under the familiar instruction of *Chevron*, an agency's construction of the statute it administers will be upheld unless it contradicts an explicit congressional directive or otherwise is an impermissible interpretation of the statute. *Chevron*, 467 U.S. at 844. The Commission's interpretation is clearly permissible. Nonetheless, even without *Chevron* deference, the FCC properly interpreted the statute.

The FCC's interpretation of "necessary" does not neutralize the deregulatory flavor of the 1996 Act. Under the FCC's interpretation, a regulation must be useful (albeit not indispensable) in promoting the public interest in order to survive the biennial—now quadrennial—review process. The "presumption," therefore, is that a regulation will be vacated or modified if it does not continue to be in the public interest. This is different from the traditional approach to rule retention, which would counsel for retention of a rule unless there were reasons to change it. In this sense, Congress' mandate and the FCC's approach is "deregulatory" because it would repeal or modify rules no longer found to be in the public interest.

The FCC looked to the structure of the 1996 Act in reaching its interpretation. The FCC recognized that "necessary" appears in other sections of the Communications Act that discuss the FCC's rulemaking powers, and in those contexts "necessary" has taken on the "useful" meaning. *See, e.g.*, 47 U.S.C. § 201(b). Holding the review process to a more stringent standard would lead to the absurd result of the FCC issuing a rule as merely useful, but then having to revoke it at the next review because it is not indispensable. Furthermore, if the rulemaking and review definitions of "necessary" were different, the FCC could simply sidestep the more stringent review standard by repealing and then reissuing any useful rules that were not indispensable.

The rulemaking provisions are permissive, while the biennial review is mandatory. *Compare, e.g., id.* (Commission "*may* prescribe such rules and regulations as *may* be necessary in the public interest") *with* § 202(h) ("The Commission *shall* review its rules . .. biennially ... and *shall* determine whether any of such rules are necessary in the public interest as the result of competition. The Commission *shall* repeal or modify any regulation it determines to be no longer in the public interest.") (emphasis added). That the FCC is permitted to make rules but required to review them,

however, does not shed light on the meaning of the term "necessary." The mandatory nature of the review is not undermined by the "useful" interpretation. The FCC *must* repeal or modify a rule that is no longer useful in promoting the public interest.

Recently in *Cellco*, 357 F.3d 88, the D.C. Circuit upheld the Agency's interpretation of "necessary" in a similar review provision of the 1996 Act.[96] The FCC's "useful" interpretation of the statutory language is a reasonable one, and should be upheld.[97]

The 1996 Act's legislative history bolsters the FCC's interpretation. Section 202(h) falls within the ambit of a larger review provision, Section 11 in the 1996 Act. The conference report regarding Section 11, H.R. Conf. Rep. No. 104-458, at 185 (1996), interprets "no longer in the public interest" as "no longer meaningful." This phrase, of course, is essentially synonymous with the phrase "no longer useful" or

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[96] *Cellco* restricted any discussion in *Fox* and *Sinclair* of a presumption to repeal or modify rules under § 202(h) to those cases' discussions of remedies. *See Cellco*, 357 F.3d at 98. I do not believe the deregulatory thrust of § 202(h) can be so easily eviscerated.

[97] "Necessary" has been found to mean more than merely "useful" or "appropriate" by other courts reviewing the 1996 Act, but these cases all dealt with other discrete portions of the statute. *See Cellular Telecomm. & Internet Ass 'n v. FCC*, 330 F.3d 502 (D.C. Cir. 2003) (dealing with § 10(a) of the 1934 Act); *GTE Serv. Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000) (dealing with 47 U.S.C. § 251); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (same). Moreover, the *Cellular Telecommunications* court explicitly rejected the "indispensable" interpretation of "necessary" as required by the statute, instead giving *Chevron* deference to the FCC's interpretation that "necessary" in § 10(a) means "referring to the existence of a strong connection between what the agency has done by way of regulation and what the agency permissibly sought to achieve." *Cellular Telecomm.*, 330 F.3d at 509-12 (discussing *GTE*, 205 F.3d 416; *Iowa Util. Bd.*, 525 U.S. 366). Most recently in *Cellco*, 357 F.3d 88, the D.C. Circuit upheld the Agency's "useful" interpretation of "necessary" in a similar review provision of the 1996 Act. *Id.* at 99.

"no longer appropriate," and much less exacting than "no longer indispensable." Thus, the Conference Report's definition of "no longer in the public interest" supports the FCC's interpretation of "necessary."

Despite § 202(h)'s admittedly deregulatory tenor, the statute does not foreclose the possibility of increased regulation under the biennial review if the Commission finds such action in the public interest. Nothing in the 1996 Act overcomes the broad rulemaking authority of the FCC. *See* 47 U.S.C. § 303(r). Any limitation must be clearly stated by Congress. *See, e.g., Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 613 (1991) (stating that "if Congress had intended to curtail in a particular area the broad rulemaking authority [it has] granted ... we would have suspected it to do so in language expressly describing an exception [to the authority]").[98]

Finally, though the Order must be consistent with the remand directives from *Fox* and *Sinclair*, and those reasoned decisions are instructive, they are not the law of the case in the current appeal. This case involves petitions for review of the FCC's comprehensive reexamination of a larger set of its broadcast ownership rules, in which a different set of parties participated, a different record was compiled, and a different result reached. *See, e.g., Hamilton v. Leavy*, 322 F.3d 776, 786 (3d Cir. 2003) (Law of the case doctrine applies only to the "same litigation.").[99]

But *Sinclair* is instructive for another reason relating to the proper application of our standard of review. In *Sinclair*, the D.C. Circuit found the Commission failed to demonstrate its exclusion of non-broadcast media from its definition of

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[98] On this point, I do not find the 1996 Act provided a highwater mark for regulation, beyond which the FCC could not regulate.

[99] As noted in the denial of the motion to transfer, "we find this case separable and independent from *Fox* and *Sinclair* . . . ." *Denial of Motion to Transfer*, at 5.

"voices" in its local television ownership rule was not arbitrary and capricious. 284 F.3d at 165. The Commission's failure in the order at issue in *Sinclair* is notably different in both kind and degree from the purported "flaws" the majority believes require vacating the FCC's Order here.

In sum, the standard of review is governed foremost by the APA's requirement that the FCC's rules not be arbitrary and capricious. Beyond this, we bear in mind the requisite flexibility afforded the Commission's rulemaking under the 1934 Act, and the particular deference granted to the Commission's decisions on diversity and other difficult to define goals. Finally, § 202(h) overlays a deregulatory tenor on our review. While I would not term this standard a "deregulatory presumption," the FCC is required to demonstrate that its rules remain useful in the public interest.

III. Rules at Issue in this Appeal and Agency Rationale for Rules

The majority partially vacates and remands the Order for the Commission to re-evaluate certain purported flaws. With regard to the Diversity Index, the majority finds the weight assigned to the Internet, as well as the assumption of equal shares for outlets within the same media type lacks record support. The majority also finds the Commission inconsistently derived its Cross Media Limits from the Diversity Index results. In regard to the local ownership rules, the majority finds the television and radio rules' reference to a particular market structure—one with equal-sized firms—as the Commission's underpinning for adopting specific ownership limits, is not supported by the record. In my view, none of these purported flaws reach the level of arbitrary and capricious decision-making or violate § 202(h).[100]

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[100] The majority also vacates and remands the Commission's decision to repeal the Failed Station Solicitation Rule, as well as its decision to retain

(Continued...)

The majority's conclusions cannot be evaluated without examining the underlying rules and the FCC's rationale for the changes. The evolution of the challenged rules puts the Agency's mammoth task in perspective. This includes discussion of the FCC's goals and objectives in its biennial review. In my view, the Agency rationale supports the rule changes and demonstrates that the Commission's decisions were neither arbitrary nor capricious.

A. Policy Goals and Media Landscape

In accordance with its 2002 biennial review obligations, the Commission initiated a comprehensive review of six media ownership rules. *Order* ¶ 1. As part of its 2002 Biennial Review, the Agency sought comment on four broadcast ownership rules: the Local Television Multiple Ownership Rule on remand from *Sinclair*; the Radio-Television Cross-Ownership Rule; the National Television Multiple Ownership Rule on remand from *Fox*;[101] and the Dual Network Rule. *2002 Biennial Regulatory Review*, 17 F.C.C.R. 18,503 (2002). The FCC also incorporated pending proceedings on local radio ownership, *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets*, 16 F.C.C.R. 19,861 (2001), *Definition of Radio Markets*, 15 F.C.C.R. 25,077 (2000), and proceedings on newspaper/broadcast

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an AM sub-cap in the Local Radio Ownership Rule. Finally, the majority instructs the Commission to provide specific notice of the Diversity Index in its rulemaking after remand. I find none of these purported flaws to be arbitrary or capricious or violate § 202(h).

[101] As the majority noted, our review of this rule is precluded by the Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99 (2004). For reasons discussed in the majority opinion, I agree this statutory directive renders challenges to the Commission's decision to maintain the UHF discount moot. I also agree the Commission is not estopped from revisiting the UHF discount in rulemaking outside the § 202(h) context.

cross-ownership. *Cross-Ownership of Broadcast Stations and Newspapers*, 16 F.C.C.R. 17,283 (2001).

The Order at issue here commenced with a notice of proposed rulemaking released in September 2002. 17 F.C.C.R. 18,503 (2002) ("NPRM"). To help guide its analysis, the Commission established a Media Ownership Working Group ("MOWG"), which commissioned twelve studies ranging from consumer surveys to economic analyses of media markets. Interested parties filed thousands of pages of comments, consisting of legal, social, and economic analyses, empirical and anecdotal evidence, and industry and consumer data to support their positions.

The result was a 256-page order in which the Commission analyzed the record and determined, by a three-to-two vote, to modify its ownership rules to provide a "new, comprehensive framework for broadcast ownership regulation." *Order* ¶ 3. The FCC adopted the Order on June 2, 2003, and released it a month later, on July 2, 2003. A summary of the Order was published in the Federal Register on August 5, 2003. 68 Fed. Reg. 46,286 (Aug. 5, 2003).

1. Policy Goals of the Present Order

In its Order, the Commission identified three longstanding policy goals that would continue to guide its ownership rules: diversity, competition, and localism. The Commission found five types of diversity relevant to ownership policy: viewpoint diversity, program diversity, outlet diversity, source diversity, and minority and female ownership diversity. *Order* ¶ 18.

Viewpoint diversity applies to the availability of media content reflecting a variety of perspectives. *Id.* ¶ 19. This goal endeavors to ensure a robust marketplace of ideas. The Commission adhered to its "longstanding determination that the policy of limiting common ownership of multiple media outlets is the most reliable means of promoting viewpoint diversity." *Id.* ¶ 26.

Programming diversity refers to a variety of programming formats and content. *Id.* ¶ 36. The Commission found that programming diversity was generally best acheived by reliance on competition between delivery systems. *Id.* ¶ 37. According to the Commission, outlet diversity means that in a given market there are multiple independently owned firms. *Id.* ¶ 38. The Commission found that regulating the ownership of outlets to achieve outlet diversity was preferable to attempting to engineer outcomes directly, because ownership regulation reduces the need for the Commission to make subjective judgments about program content. *Id.* ¶ 39.

Source diversity refers to the availability of media content from a variety of content producers. *Id.* ¶ 42. In light of dramatic changes in television markets, including the increase in the number of channels available to most households, the Commission determined that source diversity need not be an objective of its broadcast ownership policies. *Id.* ¶ 43. Minority and female diversity refers to policies which encourage minority and female ownership of media sources, and the Commission reaffirmed this policy goal in the Order. *Id.* ¶ 46.

As set forth in the preamble to the 1996 Act, Congress believed greater competition and reduced regulation would inure to the public benefit. 1996 Act, preamble, 110 Stat. 56. The Order reaffirmed the Commission's "longstanding commitment to promoting competition by ensuring pro-competitive market structures," *Order* ¶ 57, recognizing "[c]onsumers receive more choice, lower prices, and more innovative services in competitive markets than they do in markets where one or more firms exercises market power." *Id.* In satisfying its competition goal, the Commission also noted competitive markets help contribute to the related goal of viewpoint diversity. *Id.* ¶ 58. The Commission pointed out that competition also furthers the goal of product innovation. *Id.* ¶ 69.

Federal regulation of broadcasting historically has placed significant emphasis on localism. The policy goal of localism addresses whether broadcast stations are responsive to the needs and interests of their local communities. *Id.* ¶ 74. Localism is contained in congressional directives to the Commission and has been judicially reaffirmed as a valid regulatory objective. *Id.* ¶ 73; *see NBC v. United States*, 319 U.S. 190, 203 (1943) ("Local program service is a vital part of community life. A station should be ready, able, and willing to serve the needs of the local community . . . ."). The Commission sought to promote localism through market structures that take advantage of media companies' incentives to serve local communities. To measure localism, the Commission focused on the selection of programming responsive to local needs and interests, and local news quantity and quality. *Order* ¶ 78-79.

The Commission considered the regulatory framework that would best achieve its goals. It recognized that bright line rules and case-by-case analysis offer different advantages. The Commission concluded that bright line rules provide greater "certainty to outcomes, conserve resources, reduce administrative delays, lower transaction costs, increase transparency of [the] process, and ensure consistency in decisions." *Id.* ¶ 82. The Commission determined that a case-by-case process accounts for the particular circumstances of each transaction but is fraught with regulatory problems, *id.* ¶ 84, such as high administrative costs and a lack of planning and investment predictability for media owners.[102] Based on the efficiencies and predictability of bright line rules, this regulatory model supports most of the Agency's rules. *Id.* ¶ 85. The Agency reiterated the bright line rules were adopted based on a

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[102] Still, the Commission reiterated its commitment to review particular cases and to closely examine both waiver requests and petitions to deny. *Order* ¶ 85.

comprehensive review of the media marketplace and its assessment of what rules were necessary to promote its goals.

2. New Media Landscape and the Growth of the Internet

In its Order, the Commission took substantial notice of the expanding media market and significant technological advances that influence its rules. The Commission commented: "This Order confronts that challenge by determining the appropriate regulatory framework . . . in a world characterized not by information scarcity, but by media abundance." *Id.* ¶ 89.

Significant technological advances in the media marketplace over the last twenty-five years required new regulatory responses from the Commission. Among these advances in the distribution of information were the Internet, satellite distribution systems, cable television and video-cassette recorders. Today there are over 308 satellite delivered non-broadcast networks available for carriage over cable, direct broadcast satellite systems ("DBS"), and other multi-channel viewed programming distribution ("MVPD") systems. Within more traditional sources, the number of broadcast television and radio outlets have also grown significantly in the last 40 years. *Id.* ¶ 121.

This explosion of new media sources is best illustrated by the Internet. The Commission commented:

> The Internet, as an entirely new medium, composed of an amalgam of all the technologies that preceded it, completely transformed the way in which we communicate in unimaginable ways. These advances not only enabled the provision of vast amounts of content they also put more control in the hands of the public, allowing them to control what, when and how they receive information.

Order ¶ 111. The Internet provides a forum for unlimited numbers of independently administered voices. Additionally, content on the Internet is multimedia; it can be read, heard, and viewed simultaneously. *Id.* ¶ 118. The Commission also pointed out that experiencing web content is a highly individualized activity where people can access the Internet 24 hours a day anywhere they have access to a web browser. *Id.*

The Internet has spawned a new way of looking at media. The first graphical interface for the Internet was introduced in 1989. In 1992 there were only 50 websites in the world. By 1994, there were as many as 3,000 web sites in use. By year-end 2000, there were more than 30 million web sites. *Id.* ¶ 117. Approximately 42.5 million American households subscribed to an Internet access provider in 2000. *Id.* ¶ 120. According to submitted comments, 62.6 million households in 2001 were online, and that total is expected to rise to 86.3 million, or 76% of total U.S. households by 2006. *Comments of Tribune Co.*, at 10.

According to the Commission, virtually every major media company has a corresponding web site, and any person with access to a web-hosting file server can create a web site, which the public may access. Internet users can view sites of their own choosing or can use a search engine, such as Google News, which presents information gathered from approximately 4,500 news sources worldwide.[103] *Id.* ¶ 119. In conclusion, the Commission determined that:

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[103] As the Commission noted, the headlines that appear on Google News are selected entirely by computer algorithms, based on how and where the stories appear elsewhere on the web. There are no human editors at Google selecting the headlines and deciding which headlines get top placement. *Order* 119 n.230 (citing *A Novel Approach to News*, Google News (BETA), *at* www.google.com/help/about_news_search.html).

> there are far more types of media available today, far more outlets per-type of media today, and far more news and public interest programming options available to the public today than ever before. Although many of tl.ese new outlets are subscription-based . . . the competitive pressure placed upon free, over-the-air media has led to better quality and in some cases, an increase in the quantity of some types of content. In the next five to ten years, we expect more free, over-the-air content to become available as new technologies (i.e., digital transmission) are applied to these traditional media (i.e., broadcast television).

Id. ¶ 128. This dynamic, rapidly changing media landscape provided the backdrop for the Commission's ownership rules.

B. Ownership Rules

1. Cross-Ownership Rules

a. History of Cross-Ownership Regulation

For many years the Commission maintained rules governing cross-ownership of media in local markets. From 1975 through the present Order, the Newspaper/Broadcast Cross-Ownership Rule prohibited a single company from owning a full-service radio or television broadcast station and a daily newspaper serving the same community. *See* 47 C.F.R. § 73.3555(d) (2002). The rule was intended to promote media competition and diversity. 50 F.C.C.2d at 1074. The Commission examined the newspaper/broadcast cross-ownership prohibition in 1998 and concluded that the rule continued to serve the public interest because it furthered diversity. 15 F.C.C.R. at 11,105-08 ¶¶ 89-93. In that review, the Commission noted the rule should be continually reviewed to ensure it remained in the public interest. Specifically, the Commission noted "[t]here may be instances, for example, in which, given the size of the market

and the size and type of the newspaper and broadcast outlet involved, sufficient diversity and competition would remain if a newspaper/broadcast combination were allowed." *Id.* at 11,109 ¶ 95.

In 1970 the Commission issued a "one-to-a-market" Radio/Television Cross-Ownership Rule, which proscribed common ownership of more than one full-time broadcast station (radio or television) in the same market. *Amendment of Sections 73.35, 73.240, and 73.636 of the Commission Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations*, 22 F.C.C. 2d 306, 307-08 ¶¶ 5-8 (1970). Like the newspaper/broadcast rule, the purpose of the rule was twofold: (1) to promote competition in broadcasting; and (2) to promote diversification of programming sources and viewpoints. *Id.* at 307 ¶ 3. In 1989, the Commission relaxed its "one-to-a-market" rule by implementing a lenient waiver policy for applications involving radio and televison combinations in the top 25 markets. *Second Ownership Order*, 4 F.C.C.R. 1741 ¶ 1 (1989). The 1996 Act required the Commission to extend the radio-television cross-ownership presumptive waiver policy to the top 50 television markets "consistent with the public interest, convenience, and necessity." § 202(d). Although the Commission retained the rule after the 1996 Act, it stated that it would continue to monitor the impact of the rule on the radio and television industries and would consider further modification of the rule in future biennial reviews. 14 F.C.C.R. at 12,949 ¶ 106.

In 1999, the Radio/Television Cross-Ownership Rule was modified to its current form. The Commission found the growth of media outlets, the efficiencies of joint ownership, and the public service benefits obtained from joint operations all supported its decision to allow common ownership of radio and television stations. *Id.* at 12,948 ¶ 102. Currently, the Radio/Television Cross-Ownership Rule allows a party to own up to two television stations and up to six radio stations

in a market where at least 20 independently owned media voices would remain post-merger. Where parties may own a combination of two television stations and six radio stations, the rule allows a party alternatively to own one television station and seven radio stations. A party may own up to two television stations (as permitted under the local television rule) and up to four radio stations (as permitted under the local radio rule) in markets where, post-merger, at least ten independently owned media voices would remain. A combination of one television station and one radio station is allowed regardless of the number of voices in the market. 47 C.F.R. § 73.3555(c) (2002).

In light of the 1999 relaxation of the rule, the Commission decided to proceed cautiously and monitor the impact of the new rules on diversity and competition. *See 2000 Biennial Review*, 16 F.C.C.R. 1207, 1218 ¶ 32 (2001).

In the Order at issue, the Commission repealed both cross-ownership rules and replaced them with more flexible Cross Media Limits, which established more finely-tuned cross-ownership limits in small and medium-sized markets, and placed no restrictions on cross-ownership in large markets beyond the intra-service local caps.

To provide historical perspective, and to place the repeal of the Newspaper/Broadcast Cross-Ownership Rule in proper context, it is important to note that the ban was adopted nearly three decades ago, in a media environment that has been dramatically and irreversibly transformed in the intervening years. In the nearly thirty years since the newspaper/broadcast cross-ownership prohibition was enacted, the media landscape has changed dramatically, as the Commission extensively documents in its Order. Among these changes are the growth of cable, VCRs, satellite video and audio services, and the Internet. *Order* ¶¶ 106-19. As noted, media outlets per market within broadcast television and radio have grown during this period as well, *id.* ¶ 121, providing viewers with a multitude of choices not available

twenty or even ten years ago. With other technological advancements likely in the near future, the Commission recognized that its rigid rule had become outdated. The FCC concluded that "the question confronting media companies today is not whether they will be able to dominate the distribution of news and information in any market, but whether they will be able to be heard at all among the cacophony of voices vying for the attention of Americans." *Id.* ¶ 367.

b. Repeal of Newspaper Broadcast Cross-Ownership Prohibition

The FCC looked to its policy objectives of promoting competition, localism and diversity, and concluded the Newspaper/Broadcast Cross-Ownership Rule (NBCO): 1) was neutral with respect to competition; 2) actually undermined localism by preventing newspaper-broadcast mergers that would provide more and higher-quality local news to their markets; and 3) was not necessary to preserve viewpoint diversity in most markets. *Id.* ¶ 330.

In terms of competition, the Commission concluded "the local newspaper market is distinct from the local broadcasting market," and therefore "a newspaper/broadcast combination ... cannot adversely affect competition in any product market." *Id.* ¶ 332. Synergies and cost-reductions of cross-ownership could also translate into increased competition. *Id.* ¶ 337. As discussed, the FCC measured the promotion of localism through two metrics: "the selection of programming responsive to local needs and interests, and local news quantity and quality." *Id.* ¶ 78. The FCC determined cross-ownership promotes localism because it allows newspaper stations and broadcast stations to pool their resources, allowing the whole of their coverage to exceed the sum of their parts. "Specifically, MOWG Study No. 7 found that while non-network owned but network-affiliated stations provide, on average, 14.9 hours per week of local news and public affairs programming, newspaper-owned affiliated

stations provide almost 50% more such programming, averaging 21.9 hours per week." *Id.* ¶ 344. In addition, the study found the average number of hours of local news and public affairs programming provided by same-market, commercially owned television-newspaper combinations was 25.6 hours/week, compared to 16.3 hours/week for the sample of television stations owned by out-of-market newspapers. *Id.* The FCC also found corresponding advantages in quality of local coverage provided by newspaper-owned stations, as shown by ratings (measuring consumer approval) and industry awards (measuring critical approval). *Id.* ¶ 345. Substantial evidence supports the Commission's decision that cross-ownership translates into pro-competitive public interest benefits.

The FCC concluded the negative effects of the NBCO Rule on localism hurt diversity as well: if local stations do not have the resources to provide a high quantity and quality of news, the number of strong voices in their market will be diminished. The FCC cited record evidence both supporting and refuting the notion that common ownership leads to common viewpoint among media properties. From this conflicting evidence, the FCC inferred that "although there is evidence to suggest that ownership influences viewpoint, the degree to which it does so cannot be established with any certitude." *Id.* ¶ 364.

The Commission also examined the growth in media outlets, including the addition of cable and the Internet as viable news sources. It concluded the large number of new voices rendered the NBCO unnecessary for purposes of protecting diversity, because any loss in independent voices resulting from cross-ownership would, in all but the most concentrated markets, be counterbalanced by the plethora of alternative voices. The Order concluded "competing media outlets abound in markets of all sizes ...." *Id.* ¶ 365. Specifically, the Commission pointed to the expanding role of cable in providing varied content, including local news

and public affairs programming. *Id.* The Order continued, noting:

> The Internet, too, is becoming a commonly-used source for news, commentary, community affairs, and national/international information. Seventy-two percent of Americans are now online and spend an average of nine hours weekly on the Internet. MOWG Study No. 3 suggests that consumers generally view Internet news sources as a substitute for daily newspapers and broadcast news ... the Internet does play an important role in the available media mix.

Id. ¶ 365. It is also worth noting that none of the 30 million web sites existing in the year 2000 existed when the NBCO Rule was first adopted.

The record supports: (1) the growth in television and radio outlets; and (2) that cable and the Internet were properly cited in the growth of media outlets. Additionally, the benefits to localism from cross-ownership provide a rational basis for repealing the blanket prohibition. Moreover, the Agency's decision on the mixed record is particularly reasonable in light of the deregulatory tenor of § 202(h).

c. Cross-Media Limits

The record and the Commission's experience led it to conclude that more narrowly focused limits were necessary in certain specific situations to guard against "an elevated risk of harm to the range and breadth of viewpoints that may be available to the public," resulting from cross-ownership of media properties. *Order* ¶ 442. Having examined the record evidence, the Commission reasonably concluded that new limits were necessary "to check the acquisition by any single entity of a dominant position in local media markets—not in economic terms, but in the sense of being able to dominate public debate—through combinations of cross-media properties." *Id.* ¶ 432.

In that vein, the FCC adopted a methodology termed the Diversity Index to provide its new media cross-ownership framework with an empirical footing. The Diversity Index takes account of certain media outlets available to consumers, the relative importance of those media as sources of local news, and ownership concentration across these media. *Id.* ¶ 391.

Based on detailed analysis of the record, informed by the Diversity Index, the FCC adopted the following Cross Media Limits:

Number of Television Stations in Market	Cross-Ownership Limits
1-3 television stations	No cross-ownership of newspapers, radio stations, or television stations.
4-8 television stations	Single entity may own a daily newspaper and either: (1) a television station and up to half the maximum number of radio stations allowed by the local radio rules; or (2) no television station and as many radio stations as allowed by the cross-ownership rule. Additionally, a television owner who owns a duopoly (two television stations) may not own a newspaper; likewise, a newspaper owner may only own one television station.
Over 9 television stations	No cross-ownership limits.

As noted, in crafting its Cross Media Limits, the FCC drew upon the Diversity Index, which it modeled after the Herfindahl-Hirschmann Index ("HHI"). The HHI was

originally constructed to measure market concentration in the context of economic competition; if a given market's HHI was too high, it signaled the market was at risk of being monopolized. By analogy, the FCC used its Diversity Index to determine which media markets presented the highest risk of ownership concentration. Underlying this objective is the premise that media ownership influences viewpoint, so that highly concentrated media ownership could negatively impact the diversity of viewpoints disseminated within a market.

The FCC chose the HHI as its market concentration metric over a simple firm count because of the former's greater sensitivity for concentration. *Id.* ¶ 396. The HHI sums the squares of firms' market shares in a given market. The higher a market's HHI, the more concentrated it is. For example, an economic market with only one firm (a monopoly) would have an HHI of 10000 (100 squared), while a market shared equally among ten firms ("Market A") would have an HHI of 1000 (10 times 10 squared). A firm count system would treat Market A as evenly concentrated with a ten-market firm having a market share breakdown of 30-30-5-5-5-5-5-5-5-5 ("Market B") because each market contains ten firms. In contrast, the HHI supports the intuition that Market B is actually vastly more concentrated, with an HHI of 2000. Furthermore, unlike the firm count system, the HHI recognizes that a merger between two large firms creates a more concentrated market than a merger between two smaller firms. If the two 30% firms merged in Market B, its HHI would rise to 3800, while a merger of two 5% firms would increase the HHI to 2050. The firm count system would undiscerningly treat both mergers the same, however, by noting that both markets would now have 9 firms instead of 10.

The FCC adapted the HHI to viewpoint diversity by ascertaining different media's shares of consumers' local news preferences. MOWG Study No. 8, a nationwide survey,

asked respondents to identify sources used in the past seven days for local news and current affairs, offering the following answer choices: "television, newspaper, radio, Internet, magazines, friends/family, other, none, don't know, and refuse." *Id.* ¶ 402. The Study then asked respondents to identify the sources they had used in the past 7 days for national news. According to Study No. 8, the five leading sources of local news were television, newspapers, radio, the Internet and magazines. In apportioning media shares, however, the FCC decided to discount magazines entirely because they only accounted for 6.8% of respondents' answers, and only .6% of respondents identified magazines as their "primary" source of local or national news. Furthermore, the Pew Research Center conducted a study that showed only 4.2% of their responses cited news magazines as a source of local or national news. The FCC concluded such small figures for local *or* national news presaged even lower figures for local news only, because, with isolated exceptions, most magazines are national in focus. Accordingly, the FCC reasoned that magazines would have a negligible weight in the Diversity Index and should properly be excluded, at least until the next biennial review. After excluding magazines, and adjusting the remaining market shares accordingly, the user shares of the remaining four media were 33.8% for television, 28.8% for newspapers, 24.9% for radio and 12.5% for the Internet.

The FCC then explored whether any of the media could be broken down into sub-media (i.e., television into broadcast and cable, newspapers into daily and weekly). The FCC decided to remove cable/satellite stations/providers from the voice pool because it was unclear whether the Study No. 8 respondents who said they received local news from cable television were in reality watching broadcast channels on their cable platforms. *Id.* ¶ 414. Additionally, local cable stations are only available to approximately one third of all cable subscribers. *Id.* Thus, the FCC counted only broadcast

stations in its television percentage. The Order also notes the exclusion of cable from the Diversity Index will be reviewed in subsequent reviews. Such reviews will include follow-up MOWG questions concerning non-broadcast media. *Id.*

The FCC broke down newspapers into daily and weekly subcategories, with the survey data indicating that 70.3% of newspaper respondents read dailies and 29.7% read weeklies. The FCC used these weights to divide the total newspaper share (28.8%) among daily (20.2%) and weekly (8.6%) newspapers. Finally, the FCC separated the Internet into cable modem users and "other users." The Commission's studies demonstrated the appropriate break-down was 18.3% cable users and 81.7% dial-up or DSL users. Therefore, of the 12.5% of the media market allocated to the Internet, that percentage was broken down into 2.3% for cable users, and 10.2% for dial-up and DSL users.

Having apportioned shares among the various media based on actual use figures, the FCC turned to weighing different outlets within the same media. Here, the Commission moved away from actual use and attributed each outlet an equal share of its media type.[104] In other words, in a market with ten television stations, the FCC did not determine what percentage of viewers actually received their local news from each of the ten stations; it simply apportioned each 10% of the television share, meaning a 3.4% share of the overall local news "market." The FCC added commonly owned shares together to divide shares of the market by owner. For example, a market with ten television stations, two of which are commonly owned, would have share figures of 6.8 and eight 3.4's rather than ten shares of 3.4. Similarly, the FCC added cross-owned shares from different media. For example, a market with ten television stations and ten radio

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[104] As noted, the Commission adopted a different policy with regard to the Internet where many more "stations," or websites, exist.

stations with one cross-ownership combination would have share figures of 5.9, nine 3.4's and nine 2.5's, rather than ten 3.4's and ten 2.5's. Once the FCC determined the breakdown of shares amongst various independent owners, it squared those shares and added them together to get the Diversity Index for the market in question. *See Order* App. C (calculating Diversity Indices for various sample markets).

The FCC then sought to determine the Diversity Indices for various sample markets as a function of their number of Television stations. Specifically, the FCC calculated the Diversity Index for every market in the U.S. with 1-5, 15 or 20 television stations. The FCC then calculated the Diversity Indices for ten randomly selected markets with 6 television stations, 7 television stations, 8 television stations, 9 television stations and 10 television stations; the FCC chose ten-market samples for each television station grouping in the 6-10 station range because so many media markets have 6-10 television stations. Using this data, the FCC determined the average Diversity Index for a market as a function of the number of television stations within that market. *Order* App. D. The FCC also calculated the average increase in HHI in each tested market that would result from various cross-ownership merger scenarios. *Id.*

The FCC noted that in antitrust analysis, a market is not considered moderately concentrated until its HHI exceeds 1000. The FCC's calculations revealed that markets with three or fewer television stations had average Diversity Indices of over 1000, and that any cross-ownership mergers in such small markets would lead to significant Diversity Index increases; consequently, the FCC decided to prohibit any cross-ownership in markets with three or fewer television stations. In markets with four to eight television stations,

which had base Diversity Indices below but near 1000,[105] the FCC determined that dangerously large Diversity Index increases would result from daily newspaper-television duopoly mergers, as well as mergers between a daily newspaper, a television station and more than half the radio stations allowed by the local radio rule. Finally, the FCC concluded that large markets, with low indices and modest Diversity Index effects from potential mergers, did not need any cross-ownership regulation at all.

The Diversity Index was not promulgated as an ownership rule. Instead, it played a supporting role in the development of the Cross Media Limits. In adopting the Diversity Index, the FCC noted: "While the Diversity Index is not perfect, nor absolutely precise, it is certainly a useful tool to inform our judgment and decision-making. It provides us with guidance, informing us about the marketplace and giving us a sense of relative weights of different media." *Order* ¶ 391. As the Commission stated, the "cross-media limits are based on a set of assumptions drawn directly from the record evidence in this proceeding ... the CML [Cross Media Limits] ... ultimately rest[] on our independent judgments about the kinds of markets that are most at-risk for viewpoint concentration, and the kinds of transactions that pose the greatest threat to diversity." *Id.* ¶ 435. In the end, the Diversity Index provided the Commission with a rough picture of the amount of media diversity concentration in markets, and how changes as a result of cross-media combinations could affect the level of diversity in markets.

The Commission's use of the Diversity Index constitutes a rational effort to lend a factual foundation to a thorny regulatory question. The development of the Diversity Index represents a bona fide approach that employs empirical

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[105] Average Diversity Indices for these markets ranged from 753-928. *See Order* App. D.

evidence to measure and inform policy choices, which do not easily lend themselves to calculation. I would affirm the Commission's effort to lend a modicum of empirical support to a regulatory issue that had not been fully revisited in nearly thirty years. Perhaps other measures might have been employed, but the development and use of the Diversity Index was rational and reasonable, and clearly neither arbitrary nor capricious. The FCC sufficiently demonstrated the new rule was "necessary in the public interest."

2. Local Television Ownership Rule

Adopted in 1964, the Commission's "duopoly" rule prohibited ownership or control of television stations with overlapping Grade B signal contours. 47 C.F.R. § 73.3555(b) (1998). Section 202(c)(2) of the 1996 Act instructed the Commission to conduct a rulemaking "to retain, modify, or eliminate" its local television ownership limitations. 110 Stat. 111. Under the 1996 Act, the Commission adopted rules permitting common ownership of two television stations with overlapping contours, so long as (1) one of the two stations is not ranked among the top four, and (2) at least eight independently owned full-power commercial and noncommercial stations remain in the market after the merger. 47 C.F.R. § 73.3555(b) (2002).

This rule was remanded to the Commission by the Court of Appeals for the D.C. Circuit in *Sinclair*. 284 F.3d 148. In that case, the court affirmed that "the local ownership rule furthers diversity at the local level and is necessary in the `public interest' under § 202(h)," *id.* at 160, but held that the FCC had not justified different definitions of "voices" in the local television and radio-television cross-ownership rules. *Id.* at 165. The court held that the Commission had "failed to demonstrate" why it excluded non-broadcast media from the ownership rules' eight-voices test. *Id.*

On remand, the agency modified the Local Television Ownership Rule. The Commission determined the old local television rule was not necessary to further public interest in

competition and viewpoint diversity. *Order* ¶ 133. But the Agency determined that some ownership limits remained necessary to promote competition. *Id.* The modified rule permits common ownership of up to two commercial stations in markets that have 17 or fewer full-power commercial and non-commercial stations, and up to three commercial stations in markets that have 18 or more stations. *Id.* ¶ 186. The Agency also prohibited combinations which would result in a single entity acquiring more than one station ranked in the top four in the market based on audience share. *Id.* Therefore, the rule prohibits ownership of more than one television station in any market with fewer than five television stations.[106] *Id.* The new local television limits are reproduced in the following table:

Number of stations in a Market	Number of combinations allowed
four or fewer	No combinations (per operation of the top-four restriction).
five to seventeen	Two stations may be combined, as long as both of the combining stations are not in the top four.
eighteen or more	Three stations may be combined, as long as two of the combining stations are not in the top four.

The Commission found the common ownership of television stations in local markets can "result in consumer welfare enhancing efficiencies," by eliminating redundant expenses and increasing opportunities for "cross-promotion and counter-programming." *Id.* ¶ 147. These efficiencies would enable local broadcasters to better compete with cable and digital providers and would also "spur the transition to digital television," which the FCC identified as a goal in the public interest. *Id.* ¶ 148.

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[106] This aspect of the Rule will be referred to as the top-four rule.

Such common ownership was not found to have a detrimental effect on audience ratings. *Id.* ¶ 150. Importantly, the Commission concluded that "owners/operators of same-market combinations have the ability and incentive to offer more programming responsive to the needs and interests of their communities and that in many cases, that is what they do." *Id.* ¶ 164. In fact, "[a]udience share data ... reveals that common ownership of two broadcast televison stations has generally improved audience ratings." *Id.* ¶ 150.

According to the Commission, the new rule does not compromise its diversity goals because the modified caps ensure at least six firms in markets with twelve or more stations. *Id.* ¶ 207. The Commission explained that it would permit additional concentration in markets with less than twelve television stations because the economies of local stations justified an increase in market concentration as markets get smaller. *Id.* ¶ 201. Indeed, the Commission noted that its local television rule—designed to protect competition—necessarily also protects diversity. *Id.* ¶¶ 178, 180. Additionally, the Commission pointed out that television broadcast stations are not the only media contributing to viewpoint diversity in local markets. Numerous other sources for news are available, even within the delivered video market. *See, e.g.*, 17 F.C.C.R. 26,901, 26,909-52 ¶¶ 15-111.

In regard to the top-four restriction, the Commission explained, "in local markets, there is a general separation between the audience shares of the top four-ranked stations and audience shares of the other stations in the market." *Order* ¶ 195. Therefore, these mergers would often lead to significant increases in market consolidation. In addition, the Commission found that combinations of the top-four stations were less likely to yield public interest benefits in terms of local news or improved technology. *Id.* ¶ 199.

The FCC further justified the specific numerical caps in its local television ownership rule by employing the Department

of Justice and Federal Trade Commission's "standard approach" to evaluating competitive harms of an increase in horizontal market concentration: as noted, the Herfindahl-Hirschmann Index. In developing the new local ownership tiers, the FCC looked to the HHI used in merger analysis, selecting an HHI of 1800 as the benchmark for competitively suspect combinations. The DOJ/FTC merger guidelines recognize the HHI level of 1800 as the maximum level for "moderate" concentration. The FCC selected the upper bound for moderate concentration, instead of the lower bound of 1000, in recognition of the competitive pressures exerted by the cable networks. *Id.* ¶ 192. The ownership rules ensure that in markets with 12 or more stations, there will be at least six competing firms. *Id.* ¶ 207. Six equal-sized competitors in a market corresponds to an HHI of 1800. While the rule allows for fewer firms in smaller markets, the Commission explained that such increased levels of concentration were justified by the economics of smaller market stations. *Id.* ¶ 1201.

The Commission justified its assumption of equal-share television stations. Television market shares vary widely. *Id.* ¶ 193. Due to shifts in programming popularity and product innovation, market shares in broadcasting are more fluid than in other industries. The Commission found that television shares can shift substantially over the life of a firm's investment in a particular station. Thus, in constructing its rules, the Commission focused on "a firm's `capacity' to deliver programming"—i.e., "the number of licenses that a firm controls in a market." *Id.* As the Commission explained, license caps—as opposed to limits on market share—are well-suited to serve the Commission's diversity goals. *Id.* ¶¶ 129, 178. The Commission's amendment of the local television rule is well-supported by the record and would provide a benchmark for future revisions.

3. Local Radio Ownership Rule

For many years the Commission limited local radio ownership to no more than one AM and FM station with overlapping signal contours. *See, e.g., Amendment of Section 73.3555 of the Commission's Rules*, 4 F.C.C.R. 1723, 1723 ¶¶ 5-6 (1989). In 1992 the Commission relaxed its rules to permit common ownership of radio stations in line with the size of various local market tiers. *Revision of Radio Rules and Policies*, 7 F.C.C.R. 2755, 2776 ¶ 40 (1992), *on reconsideration*, 7 F.C.C.R. 6387 (1992). In its 1992 rulemaking, the Commission considered using the Arbitron rating service to define radio markets, and the number of stations in the market. *Id.* at 2778 ¶ 45. In the end, however, the Agency decided to define radio markets based on signal contour overlap.[107]

Section 202(b)(1) of the 1996 Act required the FCC to revise its limits on the number of stations an entity could own in a particular market by adjusting both the market tiers and the numerical limits. *See Implementations of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership)*, 11 F.C.C.R. 12,368 (1996). The 1996 Act expanded multiple radio station ownership rights by setting the following common ownership limits: eight stations in markets with forty-five or more stations, with five or fewer in the same service (AM or FM), § 202(b)(1)(A); seven stations in markets with thirty to forty-four stations, with four or fewer in the same service, § 202(b)(1)(B); six stations in markets with fifteen to twenty-nine stations, with four or fewer in the same service, § 202(b)(1)(C); and five stations in markets with fifteen to twenty-nine stations, with three or fewer in the same service, provided that no single entity could own more than fifty

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[107] The contour-overlap methodology is discussed in detail *infra* pp. 175-178.

percent of the stations in such market, § 202(b)(1)(D). Congress authorized the FCC to further relax these limitations in order to permit greater common ownership if such ownership "will result in an increase in the number of radio broadcast stations in operation." § 202(b)(2). The limits are summarized below:

Number of commercial stations in market:	Number of stations a party may own:	Number of stations a party may own which are of the same service (AM or FM):
45 or more	8	5
between 30 and 44	7	4
between 15 and 29	6	4
14 or fewer	5 [with the exception that a party cannot own more than 50% of the stations in such market]	3

The new limits imposed by Congress will be regularly reviewed as the 1996 Act required the FCC to review biennially (now quadrennially) its media ownership rules and modify or repeal those it found not "necessary in the public interest." 1996 Act, § 202(h).

At the time Congress instituted these changes, the FCC defined a radio market as the geographic area covered by the overlapping contours of the stations proposed for common ownership. *See* 47 C.F.R. § 73.3555(a)(1) (1995). Under that definition, local markets were determined with reference to stations' "principal community contour"—essentially, the area reached by a station's signal at a certain level of strength. *See id.* § 73.3555(a)(3). For each proposed combination of stations, the local market was defined by "the number of ... stations whose principal community contours overlap, in whole or in part, with the principal community contours of the stations" that were proposed to be commonly owned. *Id.* Nothing in the 1996 Act addressed the methodology for defining radio markets or identifying the

number of radio stations in a market for purposes of the ownership rules.

The FCC initiated a rulemaking to change the definition of radio markets. *1998 Biennial Reg'y Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 15 F.C.C.R. 11,058, 11,091-94 (2000). In this review, the Commission expressed concern that its method of defining markets and identifying stations in the market led to "unrealistic results," and were both "illogical" and "contrary to Congress' intent." *Id.* 11093-94 ¶ 65, 67. Therefore, the Commission commenced a proceeding seeking comment on whether and how it should modify the way in which it "determine[s] the dimensions of radio markets and count[s] the number of stations in them." *Definition of Radio Markets*, 15 F.C.C.R. 25,077 1 (2001). The FCC eventually consolidated that rulemaking with another proceeding regarding the local radio ownership rules, *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Market*, 16 F.C.C.R. 19,861 ¶ 1, and then rolled the entire proceeding into the 2002 biennial review. *See Omnibus NPRM*, 17 F.C.C.R. at 18,506.

Since the passage of the 1996 Act, record evidence demonstrates dramatic transformation in the radio industry. In each of the last six years, about 20% of U.S. radio stations have changed hands in a frenzy of deal-making. From 1996 to 2002, the number of radio stations owners declined by 34% even though the number of commercial stations increased by 5.4%. Within individual markets, small numbers of large owners often dominate. The audience shares of the top four firms in smaller markets are even higher than in larger markets. The audience share of the top four firms in markets 51-100 and 101-289 is 92.5% and 93.9% respectively. This has led to high market concentrations, as measured by the HHI. When conducting

its 2002 biennial review, the FCC was faced with significant consolidation in radio markets.

In the Order at issue, the Commission determined that it should retain the numerical limits in the local radio rule, but that it should revise the contour overlap method. The FCC proposed to replace the contour-overlap methodology with a geographic methodology, based on the Arbitron Metro Survey Areas. Arbitron, the principal radio rating service in the country, has defined radio markets (called Arbitron Metros) for most of the more populated urban areas of the country. Arbitron Metros are based on Metropolitan Areas established by the Office of Management and Budget.

The geography-based, Arbitron Market definition relies on the market definitions of Arbitron radio rating service, a private entity that measures local radio station audiences for its customer stations. *See Order* ¶¶ 275-76.[108] Additionally, the Agency decided to include commercial and non-commercial stations that are licensed to a community in the relevant Arbitron Metro,[109] as well as stations located outside the Metro that attract a minimum level of listenership in the Metro, *see id.* ¶¶ 279-81, 295, in calculating the relevant local radio market.

The Commission identified several flaws in the manner in which it presently defines radio markets, the contour-overlap

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[108] The Commission recognized, "Arbitron Metros do not cover the entire country." *Order* ¶ 1282. There are 287 Arbitron Metros, which cover 60% of the commercial radio stations, 30% of the counties, and 78% of the population above age 12 in the United States, including Puerto Rico. *Id.* Accordingly, the Commission initiated a new rulemaking proceeding to "develop radio market definitions for non-Metro areas." *Id.* ¶ 283. The use of one kind of radio definition in some markets and a different kind of definition in others does not render the rule irrational.

[109] Metro" is Arbitron's term for a geographic radio market, consisting of a particular county or set of counties with a boundary defined by Arbitron. *See Order* ¶¶ 275, 277 & n.582.

market definition. *Id.* ¶ 239. One major flaw is known as the "Pine Buff"problem or "numerator-denominator" inconsistency. The FCC described the inconsistency this way:

> [A] party is deemed to own only those stations that are represented in the numerator, *i.e.*, stations that have mutually overlapping principal community contours. In calculating the denominator, however, any radio station whose principle community contour overlaps the principal community contour of *at least one* of the radio stations in the numerator is counted as being in the market, regardless of who owns the station. As a result, the denominator may include radio stations that are owned by the same party that owns the radio stations represented in the numerator. Because those stations are counted in the denominator, they are by definition "in" the market, but they would not count against the party's ownership limit in that market unless their principal community contours overlap the principal community contours of all the radio stations in the numerator.

Id. ¶ 253.

Numerator-denominator inconsistency causes two potential problems. First, because commonly owned stations in the denominator are not counted in the numerator, a party could use its own radio stations to increase the size of a market and "bump" itself into a higher ownership tier. The more common occurrence, according to the FCC, is that the inconsistency allows a party to own radio stations in the relevant market without having those stations count against the party's ownership limits. The contour-overlap methodology thus allows entities to circumvent the ownership limits, which are intended to promote competition

and "to protect against excessive concentration levels in local radio markets." *Id.* ¶ 254.

The FCC also determined this irrationality in the contour-overlap methodology could not be fixed. If commonly owned stations are excluded from the denominator, then market size would be contingent upon who owned what station, "a distinction that would be both unprincipled and unprecedented in the history of competition analysis." *Id.* ¶ 255. If all commonly owned stations in the denominator are included in the numerator, "a party's ownership level in a particular market may be overly inflated by outlying stations far from the area of concentration." *Id.* Further, the FCC's interim adoption of a modified contour-overlap methodology for non-Arbitron Metro areas does not repudiate these findings. The FCC concluded temporary use of the old method was unavoidable during the pendency of the rulemaking process. *Id.* ¶ 283. And because this method was well-understood, it at least had the benefit of permitting orderly processing of radio station applications. The FCC noted, however, that the adjustments made could only "minimize the more problematic aspects of that system." *Id.* ¶ 285.

The contour-overlap approach is contrary to traditional antitrust principles, which employ "relevant geographic markets" for purposes of competition analysis. Though radio stations are signal-based products, the FCC effectively addressed this point by noting: "[r]adio stations serve people, not land," and "people in the United States tend to be clustered around specific population centers." *Id.* ¶ 273. This is demonstrated by the fact that the 287 Arbitron Metros cover only 30% of the counties in the United States, but cover 78% of the population above the age of twelve. *Id.* ¶ 282. It is also noteworthy that the Justice Department often treats Arbitron Metros as the relevant market for antitrust purposes. *See United States v. CBS Corp. and Am. Radio Sys. Corp., Proposed Final Judgment and Competitive Impact*

Statement, 63 Fed. Reg. 18036, 18044-45 (Apr. 13, 1998). "The fact that radio signals are not congruent with geographic boundaries does not undermine the logic of relying on geographic areas to define radio markets." *Order* ¶ 273.

In addition, the "subjective market" problem has other drawbacks. Because stations with larger signal contours are more likely to create larger radio markets, the contour-overlap methodology disproportionately encourages the consolidation of powerful stations relative to smaller stations. Also, radio stations may overlap only a very small portion of a given "market." So while they are part of that market, these stations may be unable to serve effectively the listeners or advertisers affected by the proposed consolidation. Finally, the fact that every "market" is unique frustrates the FCC's ability to benchmark and compute the level of consolidation in a given area.

The FCC not only discussed the flaws in the contour-overlap methodology but also addressed concerns raised about the Arbitron Metro methodology. As the FCC conceded, "any methodology we develop may create anomalous situations in certain instances. But we cannot agree that our inability to achieve perfection in every instance justifies maintaining the current system." *Id.* ¶ 263. The FCC established safeguards to deter parties from attempting to manipulate Aribtron market definitions. Specifically, a radio station licensed by a community outside the Metro will not be considered "home" to a Metro for purposes of the ownership rules until that change has been in place for two years. Similarly, changes in Metro boundaries will be subject to a similar two year rule. The FCC believed these safeguards will ensure that changes made to Arbitron Metros will be made "to reflect actual market conditions and not to circumvent the local radio ownership rule." *Id.* ¶ 278.

The FCC cited several reasons why the Arbitron Metro methodology is a more rational way to define radio markets

than the contour method. As stated, Arbitron Metros are consistently considered the relevant geographic market for antitrust purposes. Arbitron market definitions are also industry standards. It is reasonable for an agency to rely on industry defined standards. *See AT&T Corp. v. FCC*, 220 F.3d 607, 627 (D.C. Cir. 2000) (stating that the FCC's reliance on "industry-approved metrics" in lieu of conducting its own competition study was not arbitrary and capricious).

Whether the contour-overlap methodology or the Arbitron Metro methodology more effectively promotes competition between radio stations cannot easily be quantified. Cf. *NCCB*, 436 U.S. at 796-97 (rejecting argument that the rulemaking record did not demonstrate the new rule would in fact lead to increased diversity and stating that "diversity and its effects" are "elusive concepts" and "not easily defined"). "To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles by specialization, by insight gained through experience, and by more flexible procedure." *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 96 (1953) (internal quotations omitted). As discussed, the FCC provided several reasons why it believed the Arbitron Metro methodology is superior to the contour-overlap methodology. This type of "line-drawing" determination is entitled to "broad leeway" and deference. *Sinclair*, 284 F.3d at 159. An agency is "free to change its position" if it supplies "adequate data and a reasoned analysis to support the change." *Natural Resources Def Council, Inc. v. E.P.A.*, 790 F.2d 289, 298 (3d Cir. 1986). The FCC met this burden with respect to its decision to switch from the contour-overlap market definition to Arbitron Metros.

Having settled on a revised local radio market definition, the Commission reaffirmed the ownership tiers established by Congress in the 1996 Act. The Commission emphasized

that "[n]umerical limits help to keep the available capacity from becoming 'locked-up' in the hands of one or a few owners, and thus help prevent the formation of market power" in competing for listeners. *Order* ¶ 288. The Commission observed that "[t]he current tiers ensure that, in markets with between 27 and 51 radio stations, there will be approximately five or six radio firms of roughly equal size," and that many of the top 100 metro markets fall within that range. *Id.* ¶ 289. Finding "that the concentration levels permitted by the current rule represent a reasonable and necessary balance for radio broadcasting that comports with general competition theory," the Commission "decline[d] to relax the rule to permit greater consolidation." *Id.* ¶ 290. The Commission also decided against more restrictive limits. The Commission recognized, however, "that greater levels of concentration may be needed to ensure the potential for viability of radio stations in smaller markets." *Id.* ¶ 292.

As with broadcast television, the Commission found that radio audience shares can change over time, and an appropriate evaluation of radio markets structure must take into account that licenses provide radio stations with the capacity to provide more popular programming. *See id.* ¶ 288. The Commission's assumption of equal shares when choosing its ownership limits takes account of these considerations. The Commission recognized that over the life of a firm's investment in a radio station, the market share of all stations in the market can shift substantially. Accordingly, the Commission chose an approach that counts all stations in the market as having similar capacity to compete for listeners. In evaluating the local radio ownership limits, the Commission sought "both to ensure a healthy, competitive radio market by enabling radio owners to achieve significant efficiencies though consolidation of broadcast facilities," while at the same time "ensur[ing] that such consolidation does not ... stifl[e] competitive incentives." *Id.* ¶ 293.

I agree with the Commission's determination that numerical limits on radio station ownership help preserve the limited number of station licenses from being monopolized by a few owners and help prevent the formation of market power. While interested parties may have struck the balance at a different point, or suggested rules that promoted different market structures, the line was the Commission's to draw. *NCCB*, 436 U.S. 814-15. The record supports its reasonable decision, which is neither arbitrary nor capricious.

The Commission also revised its rule to count noncommercial stations as part of the local radio market in order to account for the fact that such stations exert competitive pressures in the listening and program production markets. *Order* ¶ 239. The Agency found because "noncommercial stations ... receive a significant listening share in their respective markets," their existence "exerts competitive pressure on all other radio stations in the market." *Id.* ¶ 295. Additionally, noncommercial stations count in determining the size of the local market. *Id.* The FCC also determined it would prohibit the transfer of station combinations that violate the local radio ownership rule at the time of sale, subject to a limited exception for sales to "eligible entities."[110] *Id.* ¶ 489. The FCC found the disadvantages of allowing the transfer of combinations which do not comport with the ownership limits are not outweighed by countervailing considerations, such as owners' expectancy. *Id.* ¶ 487.

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[110] The FCC defined "eligible entities" as companies with six million dollars or less in annual revenue. *Order* ¶ 489. Only such entities may acquire non-compliant combinations. Eligible entities may not transfer a grandfathered combination aquired after the adoption date of this Order to a non-eligible entity unless the transferor entity held the combination for a minimum of three years. *Id.* ¶ 490.

The FCC determined that Joint Sales Agreements[111] should be attributable to the brokering licensee under the new rules.[112] *Id.* ¶ 317. Where an entity owns or has an attributable interest in one or more stations in a local radio market, joint advertising sales of another station in that market for more than 15 percent of the brokered station's advertising time per week will result in counting the brokered station toward the brokering licensee's ownership caps. *Id.* The FCC justified this change in the attribution rule with its finding that in-market JSAs above the 15% threshold convey to the brokering entity a degree of "influence or control" sufficient to warrant attribution under the ownership rules. *Id.* ¶ 318. The FCC gave licensees two years from the effective date of its Order to terminate sales and programming agreements that do not comply with the modified local radio ownership rules, and declined to allow any transfers on non-compliant combinations that included the newly attributable sales and programming agreements. *Id.* ¶¶ 325, 491. I find the Commission's conclusions in the Local Radio Ownership Rule to be reasonable, and clearly not arbitrary and capricious.

For the reasons stated, I believe the Agency sufficiently supported its rule changes. The Commission's decisions were neither arbitrary nor capricious, were supported by the record and are in the public interest. The majority affirms some of the Commission's conclusions as well. I concur with the

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[111] A typical radio Joint Sales Agreement authorizes the broker to sell advertising time for the brokered station in return for a fee paid to the licensee. The broker is generally given the authority to "hire a sales force for the brokered station, set advertising prices, and make other decisions regarding the sale of advertising time." *Order* ¶ 316.

[112] The FCC previously attributed Local Marketing Agreements (LMAs) in both radio and television. *Revision of Radio Rules and Policies*, 7 F.C.C.R. 2755, 2788-89; *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, 14 F.C.C.R. 12,559, 12,612 (1999).

majority in its affirmance of certain of the Commission's conclusions. For the Cross-Ownership Rules, I agree the Commission's decision not to retain a ban on newspaper/broadcast cross-ownership is justified under § 202(h) and is supported by record evidence, and the Commission's decision to retain some limits on common ownership of different-type media outlets was constitutional and did not violate § 202(h). For the Local Television Ownership Rule, I agree the Commission's decision to retain the top-four restriction is justified and the threshold challenges to the Commission's regulatory approach fail. For the Local Radio Ownership Rule, I agree the Commission justified the switch to Arbitron Markets, that the Commission was warranted in including noncommercial stations, and the transfer restriction and attribution of Joint Sales Agreements should be upheld. I now turn to those areas where the majority finds the Commission's decisions unsupported.

IV. Engaging Flaws Found by the Majority

A. Cross-Ownership Rule and the Diversity Index

The majority criticizes the weight given to the Internet in the Diversity Index, as well as the Commission's decision to attribute equal market shares to different outlets within the same media type. The majority also finds the Commission inconsistently derived the Cross Media Limits from the Diversity Index. Finally, the majority requires specific notice of the Diversity Index on remand.

Before addressing these conclusions, it bears reiterating, as the Supreme Court recognized in *FCC v. NCCB*, that "[d]iversity and its effects are ... elusive concepts, not easily defined let alone measured without making qualitative judgments on both policy and First Amendment grounds." 436 U.S. at 796-97 (internal quotations omitted). In reviewing the Agency's methodological choices and line-drawing in these areas, the Commission's determinations deserve deference. *See Sinclair*, 284 F.3d at 159. Furthermore, I agree with the Commission's explanation that

the Diversity Index is not the final rule, nor the sole consideration relied upon, but rather a tool created to provide the Cross Media Limits with empirical footing. As such, the Agency's choice and formulation of a metric should be granted deference unless it can be shown to be unreasonable. The majority falls short of such a showing.

1. Weight Attributed to the Internet

The Order concludes that diversity is best measured by outlets that provide local news. *Order* ¶ 391. The majority claims the Diversity Index grants too much weight to the Internet, understating the level of market concentration and overstating the level of diversity in a given market.[113] Although conceding the Internet contributes to viewpoint diversity, the majority states, "we believe that the Commission gave too much weight to the Internet in deriving the Cross-Media Limits." But the Commission's line-drawing is not arbitrary or capricious. The majority has substituted its judgment for that of the FCC.

Although the majority finds the exclusion of cable from the Diversity Index to be justified, it holds the FCC's differential treatment of the Internet versus cable is unsupported. The FCC excluded cable because of serious doubts as to the extent cable provided independent local news as opposed to merely transmitting broadcast signals. The majority finds the Internet also largely transmits local news by providing another platform for local newspapers and broadcast stations. The majority holds the FCC must somehow discount responses that relied on websites that republished information reported by a broadcast or newspaper counterpart, or provide more persuasive evidence of significant independent local news on the Internet.

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[113] I note at the outset the Commission created the Diversity Index with the intention to "understat[e] the true level of viewpoint diversity." *Order* ¶ 400. This makes the majority's conclusion even less persuasive.

To provide a reference point, the FCC's distinction between cable and the Internet is distinguishable from the Commission's unsupported and conflicting definition of "voices" in *Sinclair*. *See* 284 F.3d at 162-65. In that case, the Court of Appeals for the D.C. Circuit noted the choice of eight competing voices and the definition of voices in the Commission's local television rule "are quintessentially matters of line drawing invoking the Commission's expertise in projecting market results." *Id.* at 162. But the court invalidated the Commission's definition of voices because the FCC did not adequately explain why it included only broadcast television stations as voices. *Id.* at 165. The court also found the Commission failed to explain its different definitions of "voices" in its local ownership rule and its cross ownership rule. *Id.* at 162.

In the Order at issue in *Sinclair*, the Commission provided two reasons for limiting its definition of voices. The first was a Roper Study, which "at no point ... compare[d] broadcast to non-broadcast television as sources of news, much less as sources of local news. Rather the Roper study simply indicated that nearly 70% of adults get most of their news from television ...." *Id.* at 163. The second reason "involved `the unresolved questions about the extent to which [non-broadcast] alternatives are widely accessible and provide meaningful substitutes to broadcast stations.'" *Id.* at 164 (quoting *Local Ownership Order* P. 33, 64 Fed Reg. 50,65 1). The Commission concluded that "in the absence of 'definitive empirical studies quantifying the extent to which the various media are substitutable in local markets,' the 'unresolved questions' on substitutability precluded further relaxation of local ownership restrictions." *Id.* The court determined that this "wait-and-see approach ... cannot be squared with [the Commission's] statutory mandate ... to 'repeal or modify' any rule that is not 'necessary in the public interest.'" *Id.* (quoting *Fox Television Stations*, 280 F.3d at 1042.).

In this Order, the Commission's methodologies, studies and analyses are significantly more comprehensive than in the Local Ownership Order reviewed in *Sinclair*. The Commission has presented valid reasons to exclude cable from the Diversity Index while including the Internet at a weight of 12.5%. Although not perfect, the MOWG studies are a significant improvement over the study in *Sinclair*, which did not compare broadcast television to cable television as a source of news. In the Order reviewed here, the Commission presents evidence on the substitutability of various media as news sources. *See Order* ¶ 409. The studies relied on by the Commission, the Diversity Index, and resulting Cross-Ownership Rule represent a reasonable approach to establish rational guidelines and are not arbitrary or capricious.

Contending the Internet provides predominantly national news, the majority disputes whether the Internet is a significant source of local news. The majority also notes that most people who go online for local news merely check the websites of their local newspaper or broadcast stations. The survey relied on by the Commission, *MOWG Study No. 8*, did not identify which websites respondents used as sources of local news.[114] This omission can be fine-tuned on the next round of reviews, but, in my mind, because it does not approach the level of arbitrary or capricious action, it need not be remanded, further delaying the implementation of the Commission's rules. The Commission responds that the Internet provides online-only news sites such as

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[114] The majority discusses a follow-up question where respondents who used the Internet as a news source were asked which sites they had used in the past seven days as a source of local or national news. The most predominant response was "other" (34.9%). If anything, this response demonstrates that varied, independent sources exist on the Internet.

Salon.com,[115] online-only collections of news such as the Drudge Report,[116] and otherwise provides a vast universe of information not contained in local newspapers or broadcasts.[117] *Order* ¶ 427.

Although formal local news sites on the Internet are occasionally online platforms for newspapers and broadcast stations, individuals may nonetheless receive news from various local websites that directly transmit their own "news," rather than collect it as "news." *Reply Comments of Media Gen., Inc.*, at 15-16. As the Commission noted, "[although many local newspaper and broadcast stations maintain websites with news content, that does not begin to plumb the extent of news sources on the Internet." *Order* ¶ 427. I agree. The majority contends the FCC should have discounted responses suggesting Internet use was constrained to online platforms for real world media. Even assuming the Commission had sufficient data to make such a calculation in this biennial review, it is not clear 12.5% was an inappropriate weight to attribute to the Internet. With future Internet growth, the Internet familiarity of the next generation of media users, and the fact that local information can be received outside of one's geographic locality, the Commission likely understated the Internet media share. These considerations only emphasize that determining the

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[115] Salon.com (www.salon.com) is an online subscription magazine with independently produced content, though much of this content does not qualify as "local" news.

[116] The Drudge Report (www.drudgereport.com) is an online collection of news that is not independently produced, though the news is independently prioritized and displayed.

[117] The majority criticizes the Commission for citing two websites that do not specialize in independent local news—www.salon.com and www.drudgereport.com. These sites were noted as compilations of news unique to the Internet. The Commission is not required to provide examples of independent local websites in the Order. The record fills this gap.

appropriate weight for each media source is as much art as science, and the choice of 12.5% was reasonable.

At several places in the Order, the Commission supported its chosen weight for the Internet in the Diversity Index. The FCC found, "[t]he web provides an unrestrained forum for the dissemination and consumption of ideas." *Order* ¶ 119. The Commission also found that the Internet "is becoming a commonly-used source for news, commentary, community affairs and national/international information." *Id.* ¶ 365. These findings are amply supported by record evidence. *See Media Gen. Comments, App. 9; see also Media Gen. Reply Comments*. Comments from Media General, as well as those from Hearst Corporation (referenced in the Order at ¶ 365) pointed to the existence of a significant number of local, independent websites on the Internet.[118] Comments providing examples of websites with local content explicitly noted these examples represented a fraction of the websites with local content existing on the World Wide Web. *See Media General Comments*, 22-23 n.50 ("Indeed, there is no way in which Media General's work could ever result in an exhaustive and complete list .... With more work, the totals could have easily trebled or quadrupled."). In its Order, the Commission noted 30 million websites existed in 2000. *Order* ¶ 117. The meteoric growth in the number of sites, as well as the sheer number of sites further belie the majority's contention that independent local content does not exist in substantial amount on the Internet. In formulating its Diversity Index, the Commission made clear it looked to *potential* sources of viewpoint. *Id.* ¶ 425. The sheer number of available outlets on the Internet supports the Internet's inclusion at 12.5%.

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[118] Some websites referenced in the comments are online platforms for newspapers or broadcast stations. The existence of such sites does not discredit the existence of numerous independent websites cited in the record however.

Moreover, the record contains a significant number of websites for local government bodies and civic organizations. *See, e.g., Hearst Corp. Comments*, MM Docket No. 01-235, at 11 & n.36, Apps. A, C. As the Commission found, "[t]here is a virtual universe of information sources on the Internet and there are websites not maintained by existing news media conveying information on everything from fringe political groups to local civic events. We cannot pretend that these are not in the 'diversity' mix simply because only a small number of people may visit them." *Order* ¶ 427. The majority responds that "to accept [the Commission's] 'universe of information' characterization of the Internet's viewpoint diversity, we would also have to disregard the Commission's professed intent to focus its consideration of viewpoint diversity on *media* outlets." The majority continues, "local governments are not, themselves, 'media outlets' for viewpoint-diversity purposes. Like many entities, they just happen to use a particular media outlet—the Internet—to disseminate information."

I cannot agree with the majority's characterization. Government web sites are media *outlets* within the media type of the Internet. Particular websites—like stations within the televison and radio mediums—are outlets. *See Order* ¶ 427 & n.939 (referring to websites, stations, and publications as "information sources," not "types" of media). Also, the Commission has not excluded government and civic organization websites from its consideration in the Diversity Index. The Commission specifically avoided this sort of content analysis. *See id.* ¶ 424. These sites are relevant to diversity so long as they provide news and current affairs. The majority falls short of showing these sites fail to provide this service.[119] Again, the choice not to exclude local

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[119] To cite one of a multitude of examples, the website for the City of Philadelphia, www.phila.gov., has a specific section for Philadelphia news. *See* www.phila.gov/news. This section of the website posts many

(Continued...)

government web sites from the diversity mix is a choice properly within the purview of the Agency. Their inclusion is neither arbitrary nor capricious.[120]

Beyond specific websites, other factors, discussed in the Order, support the weight the Commission attributed to the Internet. According to the Commission, the Internet lends itself to diverse viewpoints because of its combination of breadth and accessibility. As the Order noted, "accessing Web content is a highly individualized activity." *Order* ¶ 118. Simply typing a search into a search engine can produce numerous relevant websites. The breadth of the Internet allows access to specific issues at the click of a mouse. For example, a recent search revealed a number of websites relating to the extension of a bike path on the Schuylkill River in Center City Philadelphia. *See e.g.*, http://freetheriverpark.typepad.com/ (newsletter of path access advocacy group) (last visited June 24, 2004); http://www.centercityresidents.org/SRPaccess.htm (letter in

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news releases of interest to Philadelphia residents and others. The website also contains a link to mayoral initiatives. http://www.phila.gov/mayor/initiatives/index.html. These services are substantially different from those provided by comics and classified advertisements. *See Order* ¶ 424 (explaining the Commission would not count the comics or classifieds of a newspaper toward viewpoint diversity because "it is not clear that the service has anything to do with news and current affairs."). The website also contains a link to the Philadelphia City Council homepage, which contains member bios, committee information as well as council agendas. *See* www.phila.gov/citycouncil/index.html.

[120] The following list provides some of the websites cited in the record: www.albanycounty.com, www.sfgov.org, www.sanantonio.gov, www.cityofseattle.net, www.phila.gov, www.acps.k12.va.us, and www.cityofglensfalls.com. These are local government and chamber of commerce websites that include information such as government meeting minutes, city budget reports, local community news, local human interest stories, and calendars of events.

support of park access from Center City Resident's Association) (last visited June 24, 2004).

Moreover, the Internet is unconstrained and provides a forum for a limitless number of voices and viewpoints. Recognizing the potential for viewpoint dissemination, political groups have taken their message to the Internet en masse. *See e.g.*, Larry Fish, New Web Politics: *Social Networking, Phila. Inquirer*, April 27, 2004, at 131 (discussing political candidates' use of the Internet as a campaign tool). Media watchdog sites provide an alternative to a specific political view in significant numbers. *See e.g.*, Jim Ruttenberg, *New Internet Site Turns Critical Eyes and Ears to the Right, N. Y. Times*, May 3, 2004, at A21 (describing Internet site, www.mediamatters.org, where liberal commentators monitor and counter conservative online and on-air commentators). Internet news sites have sprouted specifically to provide independent, local news. A particularly good example is the Independent Media Center of Philadelphia, *see* www.phillyimc.org, which over one million people have visited to access independent news since its founding in 2000. *See* www.phillyimc.org/about.shtml. Finally, interactive possibilities on the Internet such as message boards and chat rooms permit virtually unlimited viewpoint dissemination from a multitude of independent "sources." The Commission recognized the unique qualities of the Internet as they relate to diversity:

> Whereas other forms of media allow for only a finite number of voices and editorially-controlled viewpoints, the Internet provides the forum for an unlimited number of voices, independently administered. Furthermore, content on the Web is multi-media; it can be read, viewed, and heard simultaneously. Since Web pages are stored on Web-hosting file servers, accessing Web content is a highly individualized activity, and any individual with access to a Web browser can

> access all available Web content 24-hours a day throughout the world.

Order ¶ 118.

After reviewing numerous websites referenced in the FCC's Order and supporting comments, I am convinced that the Commission acted reasonably by including the Internet in the Diversity Index at 12.5%. With over 70% of Americans now online,[121] the FCC acted reasonably in counting the Internet as a significant addition to the media marketplace. Assigning the Internet a reasonable percentage of the overall market is a task within the range of Agency discretion. In any event, its assigned weights cannot be termed arbitrary and capricious. The Commission has committed to review the apportioning of media shares in its next review. *Order* ¶ 414; *see also Am. Family Ass'n*, 2004 U.S. App. LEXIS 9051, at *23 (discussing the Commission's "duty to evaluate its policies over time to ascertain whether they work—that is, whether they actually produce the benefits the Commission originally predicted they would") (internal quotations omitted). Each review should bring the Diversity Index—or whatever metric the Commission chooses to measure diversity—closer to the true manner in which individuals actually get their information. Based on today's media marketplace, excluding the Internet from the Diversity Index, or limiting its importance, would have sent the Commission down an arbitrary path. The Cross Media Limits and the underlying Diversity Index constitute a worthy benchmark from which the Commission can continue to refine its Cross Ownership Rule. The Commission's rules are clearly not arbitrary and capricious.

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[121] A recent study indicates that the number of Americans with Internet access has topped 200 million, or nearly three-fourths of the population older than two. *See US Online Population Tops 200 Million: Survey, available at* www.communicate.com/news_display.php?newsID=54.

As noted, I believe the Commission supported its treatment of the Internet in the Cross-Media Limits. Nonetheless, in the coming years, the Internet will present challenges for the Commission. In future quadrennial reviews, the FCC may want to reconsider how the Internet fits into the traditional concepts of measuring viewpoint diversity, especially the emphasis on local news. By nature, the Internet is uniform everywhere. Its content is not dependent on geographic or metropolitan boundaries. This fact should not undervalue this critical media as an important source for the dissemination of diverse information. In this respect, new modes to characterize diversity may be required. The Internet allows a dentist in Iraq to post a weblog with daily entries and photos from Baghdad for viewing anywhere in the world. *See* http://healingiraq.blogspot.com (last visited May 23, 2004). Because this information may not qualify as "local news," it does not follow it should be excluded from the viewpoint diversity mix. Although independent news is all-important, the ability to replicate and distribute news on the Internet, long after its original published date, may cause the Commission to rethink its sole emphasis on "independent" sources when crafting future rules.

2. Equal Market Shares Within Media Type in the Diversity Index

The majority finds the Commission did not justify its decision to assign outlets of the same media type equal market shares. As noted, the FCC first apportioned shares based on actual use figures. But when weighing outlets within the same medium, it counted outlets equally.[122] In light of its expertise and delegated authority to make these kinds of policy choices, as well as the underlying goal of viewpoint availability, I would affirm the Commission's

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[122] The Commission only deviated from this approach with the Internet. *See Order* ¶ 426.

decision to focus on media availability, rather than market share. Therefore, I would affirm the Commission's use of equal shares. Whether the assumption of equal market shares within media types is the perfect solution to a complex regulatory problem in every market is subject to legitimate debate. But I see no principled basis to invalidate the Commission's reasoned approach.

In constructing the Diversity Index, the FCC concluded that actual use data is reliable for differentiating among media types because a respondent who relies on television for local news will probably not switch to radio or newspaper because of inherent differences between the media. *Order* ¶ 409. When it came to weighing outlets within the same medium, however, the Commission decided to focus on an outlet's capacity to deliver information, rather than viewership or readership. This decision is supported by certain rationales. *Id.* ¶¶ 421-25.

Although it recognized other approaches were possible, the Commission adopted the "underlying assumption ... that all outlets have at least similar technical coverage characteristics." *Id.* ¶ 241 While this may be less true for radio stations, the Commission determined that Arbitron Metros truncate the service areas of larger, more powerful stations, equalizing service areas. Additionally, there are generally enough radio stations in a given market so that the per-station share is fairly small. *Id.*

The Commission found that substitutability within media types was much greater than substitutability between media types. *Id.* ¶ 422. So by breaking up the entire media market based on viewership, and each specific media type based on an equal share theory, the Commission chose a compromise that reflected individuals' media preferences and the relevant regulatory problem. The Commission provided the following common sense example to support its two complementary approaches:

> A radio station owner is able to change format, say from classic rock to all-news, and thus change its impact on the marketplace of ideas. But a radio station switching to all-news does not thereby turn itself into the equivalent of a televison station nor does its impact on the marketplace of ideas become that of a televison station.

Id.

As the FCC explained: "media outlets can rapidly expand their distribution of content (including local news) at very low marginal cost." *Id.* ¶ 423. The FCC asserts that actual use data within a media type is not as reliable because a media outlet could conceivably increase or decrease its local news content. The majority cites the example of the Home Shopping Network switching to a news format as an example of the improbability of the Commission's position. That the Home Shopping Network will likely not switch formats does not negate the Commission's explanation that program shifts can and do occur. Radio stations do switch format.[123] Furthermore, the Commission found local news can be added to television broadcasts at low marginal cost, especially in light of the efficiencies of cross-ownership. *Id.* Such a programming change could affect market share.

The Commission determined that current programming of a specific media outlet is not necessarily an accurate

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[123] The record shows that the number of radio transfers since the 1996 Act is unprecedented. *Radio Indus. Review 2002: Trends in Ownership, Format and Finance.* Clearly, to the extent these transfers include programming choices, market share could be fluid. One example of a programming shift likely to affect viewer-ship in many markets is the emergence of liberal talk radio. *See* Thom Hartmann, *Move Over, Right Wing Radio – the Liberals are Coming*, http://www.commondreams.org/views03/0519-03.htm (last visited May 25, 2004.).

predictor of future programming. *See* Maurice E. Stucke and Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 Antitrust L.J. 249, 277 (2001)("[E]vidence of past production does not, as a matter of logic, necessarily give a proper picture of a company's future ability to compete.' ... Even if one could define markets and assign market shares in the marketplace of ideas, just how reliable would these historic market shares be under dynamic market conditions?") (quoting *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 501 (1974)). The majority finds this "does not jibe with the Commission's decision to assign relative weights to the different media types themselves ...." This statement assumes the Commission must adopt a single strategy for apportioning shares both within and among outlets, and moreover, this strategy must perfectly account for the programming choices of newly acquired radio stations as well as the Home Shopping Network. In my view, the majority imposes an unreasonably high burden.

The Commission noted that adopting a usage measure to determine the most prominent sources for local news and public affairs would require difficult determinations about which content constitutes local news. For example, the Commission posed the question whether movie reviews should be considered. *Order* ¶ 424. Other gray areas would require similar determinations. Again, the Commission's goal is not to prescribe what content citizens access, but to ensure that a large range of viewpoints are available to the public. *Id.* ¶ 425. The equal shares approach adopted by the Commission comports with this goal. As one commentator noted:

> In the marketplace of ideas ... what matters is the number of alternative information outlets available to consumers, not the current popularity ... of the ideas communicated by each outlet. Each source of ideas available to a given consumer is equally significant from a First

> Amendment perspective. The rational way to measure the 'share' of each source of ideas available to a given set of consumers, therefore, is to give each source equal weight. It is availability and not usage of alternatives that should count, because it makes no sense to view the FCC's role as regulating the popularity, as opposed to the availability to consumers, of ideas and information. It is unpopular new ideas that may be of the greatest importance to the future. Such unpopular ideas are the essence of diversity in the marketplace of ideas.

Bruce M. Owen, *Regulatory Reform: The Telecommunications Act of 1996 and the FCC Media Ownership Rules*, 2003 Mich. St. DCL L. Rev. 671, 692 (2003).

The majority, apparently, would have chosen a different approach. But disagreement with the Commission's conclusions on such matters does not render those conclusions arbitrary and capricious. The Commission is entitled to "implement its view of the public-interest standard of the Act 'so long as that view is based on consideration of permissible factors and is otherwise reasonable.'" *WNCNListeners' Guild*, 450 U.S. at 594 (quoting *NCCB*, 436 U.S. at 793). In breaking up media types by market share and media outlets equally, in my view, the Commission incorporated public media preferences, its diversity goals, as well as industry characteristics. The Commission's decision to attribute shares within media equally was reasonable as it took account of permissible factors in light of the FCC's public interest goals.

3. Deriving the Cross Media Limits from the Diversity Index

The majority contends the Commission did not rationally derive its Cross Media Limits from the Diversity Index results. The majority correctly notes deference to the

Commission's judgment reaches its zenith when assessing the rationality of the agency's line-drawing endeavors, *see NCCB*, 436 U.S. at 814-15, but then takes issue with the "seemingly inconsistent" manner in which the line was drawn.

The majority overlooks the Commission's statement that the Diversity Index is a tool to help make judgments about cross-ownership, not the final rule. *See Order* ¶¶ 391, 435. As the Commission emphasized, the "cross-media limits are based on a set of assumptions drawn directly from the record evidence in this proceeding ... [and] ultimately rest[] on our independent judgments about the kinds of markets that are most at-risk for viewpoint concentration, and the kinds of transactions that pose the greatest threat to diversity." *Id.* ¶ 435 (emphasis added). In looking to the Diversity Index, the Commission did not abdicate its judgment for formula.

The Diversity Index—or the Cross Media Limits for that matter—will not provide the perfect limits in every local market. As the Commission stated:

> [W]e are establishing rules of nationwide applicability. We desire, therefore, to provide the industry and the public with clear, easy to administer rules reflective of common market trends and characteristics. We recognize that, in any given market, the lines we draw here may appear under- or over-inclusive. Indeed, that quality inheres in the nature of proscriptive rules themselves.

Id. ¶ 453.

The Commission decided to rely on bright-line rules in crafting its ownership rules. *Id.* ¶ 80. The FCC chose this approach because "bright line rules provide certainty to outcomes, conserve resources, reduce administrative delays, lower transaction costs, increase transparency of [the] process, and ensure consistency in decisions." *Id.* ¶ 82. As a

result of the Commission's decision to adopt a bright-line rule rather than a case-by-case approach, the rules will not always perfectly address the diversity needs of a given market. This characteristic is inherent in nationwide, prescriptive rules, and in my view does not require remand.

The majority finds the Commission allowed combinations (newspaper/television station/50% radio limit) that resulted in higher Diversity Index increases, while disallowing combinations (newspaper/television duopoly), which resulted in lower increases. But the Cross Media Limits were not based solely on the Diversity Index. In fact, the Commission directly addressed the majority's purported "inconsistency:"

> To begin with, the public interest benefits of newspaper ownership (the benefits of cross-fertilization between media) likely are *realized primarily in the first broadcast station co-owned in either service. Although there may be economic benefits to the owner from more extensive combinations, it is not clear that these benefits will accrue to the public in any meaningful way; at least the public interest component of these benefits is likely to decline incrementally as the number of stations increases.* Given that no owner will be permitted, in accordance with our local ownership cap, to hold more than two television stations in a small to medium size market, *a limit of one station in these markets for owners of local newspapers will maximize the public interest benefits, while reducing any loss in diversity.* Although the loss of diversity that might result were that owner to add a significant radio presence in the market in the market warrants a further 50% limit in the number of radio properties that owner might hold, such is not the case if a combination does not include any television properties.

Id. ¶ 467 (emphasis added).

A newspaper/television duopoly combination realizes diminishing cross-fertilization benefits in comparison to the combination of a newspaper and the first station in television or radio. Therefore, it was reasonable for the Commission to disallow newspaper/duopoly combinations even when the Diversity Index increase might be lower than that for newspaper/television station/50% radio combinations. It was rational for the Commission to deviate from the Diversity Index in creating its Cross Media Limits. This example highlights that the Cross Media Limits primarily address the impact of cross-ownership on diversity, without ignoring other ownership goals like competition and efficiency.[124]

Furthermore, the first task of the Diversity Index was to identify at-risk markets, then identify at-risk cross-ownership combinations. As the Commission commented:

> Using our diversity index analysis and our independent judgment regarding desired levels of diversity, we *first* identify 'at-risk' markets that might already be thought to be moderately concentrated for diversity purposes. We *then* identify the types of transactions that pose the greatest risk to diversity, and impose specific limits on those transactions in at-risk markets.

Id. ¶ 442 (emphasis added). The "horizontal" lines the Commission drew in its Cross Media Limits, *i.e.*, the lines between small and medium markets, and medium and large markets, are supported by the Diversity Index results. *See id.* App. D. I would not vacate and remand an effective

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[124] The majority also criticizes the Commission's decision to allow newspaper + 1 TV station + 50% radio station combinations in light of their HHI increases. But this decision is a matter within the sound discretion of the Commission's line-drawing authority.

methodology because its results do not correspond to the Commission's final rule for all combinations in all markets.

The majority focuses on the methodological choices behind the Diversity Index and overlooks the end result—the Cross Media Limits. The Agency recognized the Diversity Index to be "a blunt tool" that is neither "perfect nor absolutely precise." *Id.* ¶¶ 392, 398. I see no reason to invalidate any aspect of the Commission's Index. The Cross Media Limits were the first structural change to the Commission's Newspaper/Broadcast Cross-Ownership Rule in nearly thirty years. The Diversity Index lent transparency and empirical footing to this massive undertaking. In my view, it was reasonable for the Agency, both in designing the Diversity Index and in its final Cross Media Limits, to rely on a balanced, empirical approach that will, as a result of § 202(h), be subject to periodic reexamination.

4. Notice

On remand, the majority advises the Commission to cure its "questionable" notice of the Diversity Index. This admonition goes beyond the notice requirements of the Administrative Procedure Act. Under the APA, an agency must publish notice of either the terms or substance of the proposed rule or a description of the subjects and issues involved. 5 U.S.C. § 553(b)(3). The Commission provided notice and opportunity to comment on the newspaperibroadcast cross-ownership rule in two separate notices of proposed rulemaking. *See Newspaper/Broadcast NPRM*, 16 F.C.C.R. 17,283 (2001); *2002 Biennial NPRM*, 17 F.C.C.R. 18,503 (2002). As the majority recognizes, the Commission gave notice that it was considering "creating a new metric" to "reformulate [its] mechanism for measuring diversity and competition in a market," and that it was contemplating "design[ing] a test that accords different weights to different outlet types." *Notice*, 17 F.C.C.R at 18,539-40 ¶¶ 113-115. In the Newspaper/Broadcast NPRM, the Commission discussed at length questions regarding

diversity and competition in relation to the Newspaper/Broadcast Cross-Ownership Rule, posing questions for public comment such as: "Is it possible that the effect on diversity will be different depending on the size of the markets involved, or the predominance of newspapers and broadcast stations in a particular local market." 16 F.C.C.R. at 17,292 ¶ 18. These and other statements in the NPRMs adequately addressed the subject of the new Cross Ownership Rule.

As an analytical tool that informed the Commission's judgments about how to account for diversity in different markets, and the need for ownership limits in these markets, the Diversity Index itself was formulated as a response to comments. "Rulemaking proceedings would never end if an agency's response to comments must always be made the subject of additional comments." *Cmty. Nutrition Inst. v. Block*, 749 F.2d 50, 58 (D.C. Cir. 1984).[125] As the majority notes, formulas derived from comments do not need to be re-noticed unless prejudice will result. *Id.* ("The response may ... take the form of new scientific studies without entailing the procedural consequences appellants would impose, unless prejudice is shown."). The Diversity Index provided an empirical foundation for formulating the final rule. The choices made in creating this empirical model were within delegated agency authority and were supported by the record. I do not find the alleged lack of notice to be prejudicial. Every methodological choice will have proponents and detractors, but so long as the choices are not arbitrary and capricious, they are valid. I would not expand the settled notice and comment requirements of § 553.

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[125] As noted, the complexity of the Commission's rulemaking requires a lengthy rule making cycle. *See supra* p.132 n.91. The majority's suggestion that the Diversity Index required an additional round of notice and comment would unnecessarily extend, and delay, the Commission's § 202(h) review process.

B. Local Television Ownership Rule

The majority upholds the top-4 limit in the Local Television Ownership Rule but vacates and remands the chosen numerical limits "for the Commission to harmonize certain inconsistencies and better support its assumptions and rationale."[126]

The FCC justified the specific numerical caps in its intra-service rules (radio and television) by employing the Department of Justice and Federal Trade Commission's "standard approach" to evaluating competitive harms of an increase in horizontal market concentration: the Herfindalh-Hirshmann Index (HHI). The *DOJ/FTC Merger Guidelines* recognize the HHI level of 1800 as the maximum level for "moderate" concentration. So the FCC designed its local television rule to keep markets within the 1800 limit. *Order* ¶¶ 192-93. As noted, the FCC selected the upper bound for moderate concentration, 1800, instead of the lower bound, 1000, in recognition of the competitive pressures exerted by the cable networks. *Id.* ¶ 192.

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[126] The majority also vacates and remands the Commission's repeal of the Failed Station Solicitation Rule, 47 C.F.R. § 73.3555 n.7. In my view, the Commission adequately supported its decision to repeal this rule noting, "the efficiencies associated with operation of the two same-market stations, absent unusual circumstances, will always result in the buyer being the owner of another station in that market." *Order* ¶ 225. The Commission's explanation took account of the public interest, because a "failed, failing, or unbuilt station" cannot contribute to localism, competition, or diversity. *Id.* The Commission reasonably determined that repealing the solicitation rule in such circumstances would serve the public interest by preventing the licensee's assets from "exit[ing] the market." *Id.* The Commission concluded "the public interest benefits of activating a dark or unbuilt station, outweigh[] the potential harm to competition or diversity." *Id.* The Commission's explanation for the repeal of the FSSR demonstrates that its decision was not arbitrary and capricious, and was in the public interest.

An HHI score of 1800 corresponds to having six equal-sized competitors in a given market. This led the FCC, in part, to determine in markets of 18 stations or more, an entity could own three stations, while in markets with 5 to 17 stations, an entity could own two stations. *Id.* ¶ 193. The Commission allowed ownership of two stations in markets with less than 12 stations—though this undercuts its 6 equal-sized competitors goal—because the economics of local broadcast stations justify slight increases in market concentration as market size decreases. *Id.* ¶ 201. The FCC relied on data from the National Association of Broadcasters showing that small-market stations have a harder time competing for revenue than stations in larger markets. Thus, the local television rule represents a "graduated tradeoff between optimal competition in the delivered video market (six station owners) and recognition of the challenging nature of broadcast economics in small to mid-sized markets." *Id.* ¶ 202.

In developing the new local ownership tiers, the majority concludes the FCC failed to justify its chosen numerical limits. The majority contends that allowing triopolies in large markets does not ensure that six equal-sized competitors will emerge because the FCC does not take into account existing respective audience shares among stations in a given market. The majority also finds the FCC cannot cite "fluid" market share as a basis for regulation yet, elsewhere in the same Order, use market share differentials as justification for retaining the top-four restriction. The FCC found, for example, "a general separation between the audience shares of the top four-ranked [local] stations and the audience shares of other stations in the market." *Order* ¶ 195.[127] Furthermore,

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[127] The Commission instituted its top-four restriction in part due to the generally high market shares of the top-four stations in many markets. But this was not the sole justification for the rule. The Commission determined, "combinations involving the top four-ranked stations are less

(Continued...)

the majority finds the FCC did not cite empirical support for its "equal-sized firm" assumption, and that its assumption of equal market shares, *id.* ¶ 134, to derive its limits ignores reality. The majority finds that by assuming equal market shares the FCC allowed combinations based on unrealistic market percentages. It maintains the Agency did not rely on market share, but on a rudimentary "head count" of outlets. According to the majority, the inconsistent treatment of market share both within and between rules renders them arbitrary and capricious.[128]

In my view, the Commission justified its decision to assume equal market shares. The majority states the Commission sought to "ensure that markets would not exceed the *Merger Guidelines*' 1800 threshold for highly competitive markets." This statement portrays a heavier reliance on the *Merger Guidelines* than the Commission avowed. In discussing the relationship between its local television ownership limits and the *Merger Guidelines*, the Commission said: "a strict, overly simplistic application of the *DOJ/FTC Merger Guidelines* would potentially prohibit some welfare enhancing mergers and allow some

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likely to yield public interest benefits such as new or expanded local news programming," since "such stations are already originating local news." *Order* ¶ 198. The "[t]op four-ranked stations also are more likely to have made the transition to DTV [digital television] than other stations." *Id.* ¶ 199.

[128] The majority cites the example of Philadelphia, where the duopoly owner Viacom could acquire a third station and potentially increase its audience share from 25% to 34%. According to the majority, such a merger would raise Philadelphia's HHI score to 2487. But this assumes there would be no competitive buyers for the television station. It also fails to account for the antitrust review of proposed mergers by the Department of Justice. Finally, the proposed combination would still face competition from 12 commercial and 5 noncommercial television stations, as well as a host of additional media.

anticompetitive mergers ...." *Order* ¶ 193. The Commission also stated:

> The *DOJ/FTC Merger Guidelines* ... are written not for a specific industry, but rather as guidelines intended for application across all industries. Our rules are formulated for a specific market—the delivery of video programming—and are based on an extensive record on the extent of competition in this market and the effect of our current local TV ownership rule. This record allows us to craft a more finely-tuned rule for this industry.

Id. ¶ 192. So, in fact, the Commission did not seek to "ensure" that no market would exceed the *Merger Guidelines*' 1800 threshold for highly competitive markets. Instead the *Merger Guidelines* provided a "starting point" from which the public interest dictated the final rule. *Id.*

The majority finds that no evidence supports the Commission's equal share assumption. I disagree. The FCC found that a station's market share is too fluid to use as a basis for regulation, so its decision to regulate instead a firm's "capacity" to deliver programming is justified. *Id.* ¶ 193. Because product innovation and program choice vary with each season, a firm's market share is more fluid than in other industries. Thus, the FCC focused on a firm's capacity to deliver programming. *Id.* Over the life of a firm's investment in a station, and the duration of its license, the market breakdown can shift substantially. For example, recently launched broadcast stations now vie with the "big four" for viewers. *See id.* ¶ 110. As recently as 1995, two new broadcast networks UPN and WB were launched and now both compete—often successfully—for viewers with the "big four" networks. *See e.g.*, http://www.viacom.com/prodbyunitl.tin?ixBusUnit=30 (discussing growing popularity of UPN network) (last visited May 25, 2004); *see also Comments of Paxson*

Communications Corp., at 20 (noting retention of the UHF discount is "likely to encourage the emergence of a larger number of competitive broadcast networks to join the existing seven."). The *Merger Guidelines*, which the Commission looked to in setting its local license caps, contemplate the possibility that in instances where current revenue market shares are misleading indicators of competitive performance, equal shares can be imputed to each competitor. *DOJ/FTC Merger Guidelines* § 1.41 n.15 ("Where all firms have, on a forward-looking basis, an equal likelihood of securing sales, the Agency will assign firms equal shares.")

Moreover, the majority discounts the Commission's assertion that local limits contribute to the Agency's diversity goals. "Ensuring that several competitors remain within each of the radio and television services, we also ensure that a number of independent outlets for viewpoint will remain in every local market, thereby ensuring that our diversity goal will be promoted." *Order* ¶ 129; *see also id.* ¶ 178. Commentators have recognized that outlets, or sources, should be counted equally in the marketplace of ideas:

> I conclude that independently-owned outlets for, or sources of, ideas and information generally should each be counted equally as separate sellers in the marketplace of ideas, with response to the consumers whom they can reach (or the consumers who can reach them), without regard to the classification or popularity of their current content.

Bruce M. Owen, *Regulatory Reform*, 2003 Mich. St. DCL L. Rev. at 696.

Though not flawless in all markets, the Commission soundly justified its assumption of equal market shares as underpinning for its choice of license limits in its local television rule. In reviewing assumptions made by the

Commission in a different context, the D.C. Circuit recently wrote:

> These assumptions appear rational on the current record. We have no obvious way of verifying the FCC's assertion regarding the general characteristics ... We must defer to the Commission's expert judgment in the absence of record evidence indicating that the Commission's assumption is a clear error of judgment, or a showing that the empirical assumption is facially implausible or inconsistent.

Am. Family Ass'n, 2004 U.S. App. LEXIS 9150, at *21-22. In my view, the majority has not shown error approaching this standard. As agency line-drawing deserves deference, and the Commission's choice of equal market shares is neither arbitrary and capricious, I see no basis for overturning this decision.

C. Local Radio Ownership Rule

The majority supports the Commission's use of numerical limits in the local radio ownership rule but finds the Commission did not support its decision to retain the existing numerical limits established by § 202(b). The majority also vacates and remands the "five equal-sized firms" starting point, which undergirds the local radio rule, claiming the Commission's decision is not supported by "substantial evidence." In light of § 202(h), I agree that the Commission must explain its decision to maintain the existing limits. But I find the Commission to have justified its choices.

First, in reaching its conclusion, the majority employs too high a standard. The Commission's conclusions do not need to be supported by "substantial evidence." Rather, the Commission's line-drawing is generally not overturned "unless a petitioner can demonstrate that the lines drawn ... are patently unreasonable, having no relationship to the underlying regulatory problem." *Sinclair*, 284 F.3d at 162

(internal quotations omitted). The Commission's actions did not "run counter to the evidence before it," *id.* (quoting *Motor Vehicles*, 463 U.S. at 43), and the Commission "provide[d] a reasoned explanation for its action." *Id.*

As discussed, the FCC maintained the radio tiers established by Congress in the 1996 Act. The FCC explained that retaining the existing tiers would result in five roughly equal-sized firms in each market. *Order* ¶ 289. The Commission explained its ownership rules ensure there will be roughly five or six owners in markets with between 27 and 51 radio stations, which should allow competitive market performance. *Id.*[129] Citing economic literature, the FCC found that five equal-sized firms ensure fragmented, competitive markets. *See id.* 289 n.609. The FCC also concluded the current limits are not overly-restrictive based on data showing the top four stations in each metro market are thriving in terms of revenue and audience share. *Id.*

The majority asserts the economic studies on which the FCC relied do not support its premise that a market with five equal-sized competitors is comparable in terms of market performance to a fragmented, structurally competitive market. *See id.* ¶ 289 n. 609 (citing R. Selter, *A Simple Model of Imperfect Competition Where Four Are Few and Six Are Many*, 2 Int'l J. Game Theory 141 (1973); Louis Phillips, *Competition Policy: A Game Theory Perspective* Ch. 2 (Cambridge U. Press 1995); Timothy F. Bresnahan & Peter C. Reiss, *Entry and Competition in Concentrated Markets*, 99 J. Pol. Econ. 977-1009 (1991). The majority contends the Commission failed to respond to petitions urging market structures other than equal-sized competitors, which could provide equally competitive markets. From the other

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[129] Similar to the local television rule, the Commission acknowledged the limits allow for more consolidation in smaller markets where the viability of stations may require greater levels of concentration. *Order* ¶¶ 292-93.

direction, the majority picks up the argument of Citizen Petitioners that the game-theory articles should not be followed because they conflict with the most recent rewriting of the *Merger Guidelines*, which suggest a HHI score above 1800 corresponds with a highly concentrated market. *Merger Guidelines* § 151(c).

The Commission may favor a certain market structure if it reasonably supports its decision. The Commission is the appropriate body to choose between various equally competitive market structures when formulating its rules. *See Am. Family Ass'n*, 2004 U.S. App. LEXIS 9150, at * 16 ("Given that both options are rational, the FCC's choice of means is well within its discretion."). In structuring its rules, the Commission chose to take into account that radio audience shares change over time,[130] and an evaluation of radio market structure must also take into account that licenses provide radio stations with the capacity, and likely the incentive, to provide more popular programming. *See Order* ¶ 288. It would be irrational if a radio station did not provide more popular programming because it would surpass its allotted market share.

In determining appropriate ownership tiers, the Commission's use of antitrust theory tailored to the radio industry is reasonable. The Commission is not required to strictly follow the *Merger Guidelines* in creating its limits. As the majority recognizes, antitrust regulation and FCC ownership regulation play different roles.[131] While the

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[130] *See supra* p. 198 & n.123 (discussing the increase of license transfers in the radio industry).

[131] The Commission need not rely identically on the *Merger Guidelines* in its television and radio rules. The majority recognizes the rules need not mirror each other, but then criticizes the Commission for not following the *Merger Guidelines* to the same extent in both rules. As the majority notes, radio markets may be different, in part, due to the greater number of available stations in most markets.

majority may have struck the balance at a different point, the line was the Commission's to draw. *Sinclair*, 284 F.3d at 162.

The majority is not convinced by the Commission's assertion that five equal-sized competitors "would emerge or actually have emerged under numerical limits." Certainly, "radio station groups with similar numbers of radio stations [can] have vastly different levels of market power." *Order* ¶ 290. This assertion, however, does not require the Commission to adopt a market structure that ignores its other finding—that station shares can be fluid. Additionally, as discussed in relation to the Local Television Ownership Rule, an assumption of equal shares makes sense in terms of diversity, as each station has the *capability* of disseminating information. As the local ownership rules support the Commission's diversity objectives as well, equal shares are reasonable, and clearly not arbitrary and capricious. *See id.* ¶ 306 ("Our competition-based limits on local radio ownership thus promote viewpoint diversity, not only ensuring a sufficient number of independent radio voices, but also by preserving a market structure that facilitates and encourages entry in the local media market by new and under-represented parties.")

The majority finds the Commission "does not explain why it could not take actual market share into account when deriving the numerical limits." But in its Order, the Commission wrote:

> We also reject arguments that we incorporate a market share analysis into the local radio ownership rule or that we continue to 'flag' applications that propose radio station combinations above a certain market share .... Market share, however, must be considered in conjunction with the overall structure of the industry in determining whether market power is present. In radio, the availability of a sufficient

> number of radio channels is of particular importance in ensuring that competition can flourish in local radio markets. The numerical caps and the AM/FM service limits are designed to address that interest, *and in our judgment, establishing a inflexible market share limit in our bright-line rule would add little, if any, benefit. We do not seek to discourage radio firms from earning market share through investment in quality programming that listeners prefer*; our objective is to prevent firms from gaining market dominance through the consolidation of a significant number of key broadcast facilities. We do not believe that developing a market share limit would significantly advance that objective.

Order ¶ 300 (emphasis added).

The majority also points out the Commission has previously looked to market share for measuring diversity and competition in local radio markets. Again, the Commission expressly addressed its change in policy when it wrote:

> We recognize that our conclusion differs from the Commission's view in 1992 that an audience share cap was necessary "to prevent consolidation of the top stations in a particular local market." But the audience share cap was never intended to be more than a "backstop" to the new numerical limits the Commission had established, which for the first time allowed a party to own multiple radio stations in a local market. The audience share cap was eliminated as a result of the revisions to the local radio ownership rule that Congress mandated in the 1996 Act, which left only the numerical caps in place. But because of the problems associated with the contour-overlap market definition and

> counting methodologies, we could not rely with confidence on those numerical limits to protect against undue concentration in local markets. As a result, we began looking at revenue share in our "flagging" process and the interim policy that we established in the *Local Radio Ownership NPRM*. Now that we have established a rational system for defining radio markets and counting market participants, we believe that the numerical limits will be better able to protect against harmful concentration levels in local radio markets that might otherwise threaten the public interest.

Order ¶ 301. As noted, the Commission based its switch to the Arbitron Metro market definition—which the majority affirms—in part, on the difficulty of guarding against undue consolidation of market share under the old contour-overlap method. *See Order* ¶ 257 ("[T]he contour-overlap system actually encourages consolidation of powerful radio stations because stations with larger signal contours are more likely to create larger radio markets, which make it more likely that a party would be able to acquire additional radio stations in that market."). With a more rational market definition, which, according to the Commission, will make consolidation less likely, it was not arbitrary or capricious for the Commission to de-emphasize market share in crafting its ownership limits.

In order to warrant judicial deference, an agency's line-drawing decision must be justified by a reasonable explanation and cannot run counter to the evidence. *Sinclair*, 284 F.3d at 162; *see also NCCB*, 436 U.S. at 814-15. No record evidence invalidates the policy choices made by the Commission. Its assumptions and chosen limits correspond

to a reasonable market structure for radio programming markets.[132]

The Supreme Court has upheld FCC policy based on factual determinations "that were primarily of judgmental or predictive nature." *NCCB*, 436 U.S. at 814 (noting "complete factual support is not possible or required; 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency'") (quoting *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. at 29). I do not find § 202(h), or any other directive to the Agency, to require the Commission to ignore its well-informed predictions about which types of markets best foster its public interest goals, and consequently to create rules with these markets in mind.

V.

For the foregoing reasons, I would affirm the Commission's rules.

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[132] The majority also finds the Commission failed to justify its retention of an AM subcap. *Order* ¶ 294. I believe the Commission adequately supported the sub-caps. The Commission explained that AM and FM stations have different technological characteristics as well as different programming formats (AM stations often have news/talk/sports or ethnic formats). *Id.* The Commission originally adopted specific AM and FM ownership limits in order to "prevent one entity from putting together a powerful combination of stations in a single service that may enjoy an advantage over stations in a different service." *Revision of Radio Rules and Policies*, 7 F.C.C.R. 2755, 2778 ¶ 44. The same rationale survives today. A limit on AM station ownership will continue to create more robust competition within that frequency. Because, as the Commission explained, the AM frequency is its own sub-market, ensuring competition in this frequency is consistent with the public interest.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

August 24, 2004

Nos. 03-3388, 03-3577, 03-3578, 03-3579, 03-3580, 03-3581,03-3582, 03-3651, 03-3665, 03-3675, 03-3708, 03-3894, 03-3950, 03-3951, 03-4072, 03-4073 & 04-1956

Prometheus Radio Project v. FCC, et al.

Prometheus Radio Project, Petitioner in No. 03-3388

Media General, Inc., Petitioner in No. 03-3577

National Association of Broadcasters,
Petitioner in No. 03-3578

Network Affiliated Stations Alliance, et al.,
Petitioners in 03-3579

Fox Entertainment Group, Inc., et al.,
Petitioners in No. 03-3580

Viacom, Inc., Petitioner in No. 03-3581

National Broadcasting Company, Inc., et al.,
Petitioners in No. 03-3582

Sinclair Broadcast Group, Inc., Petitioner in No. 03-3651

Media Alliance, Petitioner in 03-3665

Paxson Communications Corporation,
Petitioner in No. 03-3675

National Council of the Churches of Christ in the U. S.,
Petitioner in No. 03-3708

Tribune Company, Petitioner in No. 03-3894

Paxson Communications Corporation,
Petitioner in No. 03-3950

Emmis Communications Corporation,
Petitioner in No. 03-3951

Center for Digital Democracy, et al.,
Petitioners in No. 03-4072

Clear Channel Communications, Petitioner in No. 03-4073

Minority Media and Telecommunications Council et al.,
Petitioners in 04-1956

(FCC No. 03-127)

Present: SCIRICA, *Chief Judge*, AMBRO and FUENTES, *Circuit Judges*

1) Petition of the FCC and United States Panel for Rehearing.

2) Response of National Association of Broadcasters to the Petition of the FCC and the United States for Panel Rehearing.

3) Partial Opposition of Citizen Petitioners to the Federal Communications Commission's and United States' Petition for Panel Rehearing.

4) Motion by Proposed Amicus Curiae, Monterey Licenses, LLC and Mid-West Management, Inc. for leave to file response as Amicus Curiae in Opposition to the Petition for Rehearing filed by Respondent Federal Communications Commission.

5) Brief of Proposed Amicus Curiae, Monterey Licenses, LLC and Mid-West Management, Inc. in Opposition to the Petition for Rehearing filed by Respondent Federal Communications Commission.

/s/ Gayle Burr

Gayle Burr 267-299-4921
Case Manager

ORDER

Inasmuch as we held in our Opinion and Judgment of June 24, 2004 that certain changes to the local radio ownership rule proposed by the Federal Communications Commission (the "Commission") in its Report and Order and Notice of Proposed Rulemaking, 18 F.C.C.R. 13,620 (2003)—specifically, using Arbitron Metro markets to define local markets, including noncommercial stations in determining the size of a market, attributing stations whose advertising is brokered under a Joint Sales Agreement to a brokering station's permissible ownership totals, and imposing a transfer restriction (collectively, the "Approved Changes")—are consititutional and/or consistent with the Administrative Procedure Act, 5 U.S.C. § 706(2), and § 202(h) of the Telecommunications Act of 1996, the foregoing motion by the Commission is granted to the extent that it requests a partial lifting of the stay to allow the Approved Changes to go into effect. All other aspects of the Commission's motion, including matters pertaining to numerical limits on local radio ownership and the AM "subcap," are hereby denied. The Motion of Monterey Licenses LLC and Mid-West Management, Inc., for Leave to File Response as Amicus Curiae in Opposition to the Commisson's motion is also hereby denied.

By the Court,
/s/ Thomas L. Ambro
Circuit Judge

Dated: September 3, 2004
ghb/cc: Counsel of Record

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-3388 **#E-59**

PROMETHEUS RADIO PROJECT,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
Respondents

*Fox Entertainment Group, Inc., Fox Television Stations, Inc., National Broadcasting Company, Inc., Telemundo Communications Group, Inc.
and Viacom, Inc.,
Intervenors
*(Pursuant to Clerk's Order dated 8/22/03)

(FCC No. 03-127)

Present: SCIRICA, *Chief Judge,* AMBRO and FUENTES, *Circuit Judges*

ORDER

Per Curiam.

Before the Court is Petitioner's motion to stay the effective date of Respondent Federal Communication Commission's new ownership rules, 2002 Biennial RegulatoryReview, 68 Fed. Reg. 46,286 (Aug. 5, 2003),

pending judicial review.[1] Extensive oral argument was heard on September 3, 2003.[2]

We consider four factors in determining whether to grant the motion to stay: (1) the movant's likelihood of success on the merits; (2) whether the movant will suffer irreparable harm if the request is denied; (3) whether third parties will be harmed by thestay; and (4) whether granting the stay will serve the public interest. *E.g., Susquenita Sch. Dist. v. Raelee*, 96 F.3d 78, 80 (3d Cir. 1996); *In re Penn Cent. Transp. Co.*, 457 F.2d
381, 384-85 (3d Cir. 1972)

At issue in this litigation are changes adopted by the FCC that would significantly alter the agency's ownership rules for multiple media properties, including nationaltelevision networks, local broadcast affiliates, radio stations, and newspapers. Petitioner has alleged harms from industry consolidation contending they would be widespread and irreversible if they occurred. The harm to petitioners absent a stay would be the likely loss of an adequate remedy should the new ownership rules be declared invalid in whole or in part. In contrast to this irreparable harm, there is little indication that a stay pending appeal will result in substantial harm to the Commission or to other interested parties. *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Granting the stay pending judicial review would maintain the status quo in order to permit appellate review after briefing on the merits. While it is difficult to predict the likelihood of success on the

---

[1] Under 28 U.S.C. § 1407, the Judicial Panel on Multidistrict Litigation has designated this Court to hear this and related petitions for review.

[2] Ordinarily, we would require strict adherence to Federal Rule of Appellate Procedure 18 that petitioner "move first before the agency for a stay of its decision or order." Fed. R. App. P. 18(a)(1). Nonetheless, under the unique circumstances of this case, it appears virtually certain that the Commission would not grant a stay in this matter.

merits at this stage of the proceedings,[3] these harms could outweigh the effect of a stay on Respondent and relevant third parties. Given the magnitude of this matter and the public's interest in reaching the proper resolution, a stay is warranted pending thorough and efficient judicial review.

For the foregoing reasons, we will grant Petitioner's motion to stay the effective date of the FCC's new ownership rules and order that the prior ownership rules remain in effect pending resolution of these proceedings.

Subject to the Court's decision on the motion to transfer venue, the Clerk shall issue a briefing schedule.

DATED: Sep. 3, 2003
ss/cc: counsel of record

---

[3] An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interestedpersons or the public and when denial of the order would inflict irreparableinjury on the movant. There is substantial equity and need for judicial protection, whether or not movant has shown a mathematical probability of success. *Holiday Tours*, 559 F.2d at 844.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 03-3388, 03-3577, 03-3578, 03-3579, 03-3580, 03-3581, 03-3582, 03-3651, 03-3665, 03-3675 & 03-3708

Prometheus Radio Project, et al. v. FCC, et al.

Prometheus Radio Project, Petitioner in No. 03-3388
Media General, Inc., Petitioner in No. 03-3577
National Association of Broadcasters,
Petitioner in No. 03-3578
Network Affiliated Stations Alliance, et al.,
Petitioners in 03-3579
Fox Entertainment Group, Inc., et al.,
Petitioners in No. 03-3580
Viacom, Inc., Petitioner in No. 03-3581
National Broadcasting Company, Inc., et al.,
Petitioners in No. 03-3582
Sinclair Broadcast Group, Inc., Petitioner in No. 03-3651
Media Alliance, Petitioner in 03-3665
Paxson Communications Corporation,
Petitioner in No. 03-3675

National Council of the Churches of Christ in the United States, Petitioner in No. 03-3708

Present: SCIRICA, *Chief Judge*, AMBRO and FUENTES, *Circuit Judges*

ORDER

FUENTES, *Circuit Judge*

I. INTRODUCTION

Before the court is Network Petitioners' Joint Motion to Transfer Venue. In their Motion, Fox Entertainment Group, Fox Television Stations, Viacom, NBC and Telemundo (hereinafter collectively referred to as "the Networks") argue that this case, randomly assigned to this Court pursuant to 28 U.S.C. § 2112(a), should be transferred to the United States Court of Appeals for the D.C. Circuit. Petitioners Media General and Sinclair

Broadcast Group have filed briefs supporting the Networks' Motion, as has Respondent FCC. Specifically, the Networks observe that, under 28 U.S.C. § 2112(a)(5), this Court may transfer venue of the case "[f]or the convenience of the parties in the interest of justice." The Networks contend that the six FCC rule changes (hereinafter "the 2002 Review") include changes made in direct response to decisions from the D.C. Circuit, *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002), and Sinclair Broadcast Group, Inc. v. FCC, 284 F.3d 148 (D.C. Cir. 2002). These two decisions invalidated two prior FCC rules, both of which were replaced in the 2002 Review.

Thus, the Networks argue that the 2002 Review is an attempt to comply with the D.C. Circuit's mandate, and that the D.C. Circuit Court is therefore best equipped to evaluate that compliance. In a related argument, the Networks claim that the D.C. Circuit Court has the most expertise with FCC matters (including exclusive jurisdiction over appeals involving specific licensing grants by the FCC) and is therefore generally best able to adjudicate such matters.[1]

---

[1] The Networks make two other arguments in favor of transfer, but neither is very persuasive to this Court. First, the Networks observe that almost all of the counsel in this case reside in Washington, and conclude that it would be most convenient for the parties to litigate there. We note, however, that Philadelphia is less than two hours by train from Washington, which we do not consider a significant inconvenience. Second, the Networks suggest that Prometheus, the party that initially

(Continued...)

Petitioners Prometheus Radio Project, Media Alliance, and the National Council of the Churches of Christ (hereinafter referred to collectively as "Citizen Petitioners") have filed a brief opposing the Networks' Motion. Citizen Petitioners argue that the genesis of the 2002 Review is qualitatively distinct from the two D.C. Circuit Court decisions for several reasons, and that D.C. Circuit Court's exclusive jurisdiction over FCC licensing decisions is irrelevant to its jurisdiction over FCC rulemaking decisions. For the reasons that follow, we conclude that the interest of justice does not support transfer of this case to the D.C. Circuit.

II. DISCUSSION

In Fox, a group of television network and cable system owners challenged two then-existing FCC rules: 1) a prohibition against any entity controlling enough television stations that they would reach more than 35% of the television households in the United States ("the NTSO rule"); and 2) a prohibition against common ownership of a broadcast station and a cable television statement in the same market ("the CBCO rule"). *Fox*, 280 F.3d at 1034-35. The D.C. Circuit held that the FCC had not adequately justified either rule as being necessary for the public interest, as required by § 202(h) of the Telecommunications Act of 1996. *Fox*, 280 F.3d at 1040-53. The D.C. Circuit remanded the NTSO rule to the FCC for a more persuasive justification, but vacated the CBCO because it could not conceivably be justified. *Id.* Less than two months later, the D.C. Circuit Court issued *Sinclair*, which dealt with the FCC's prohibition of any entity owning more than one local television station unless the market area had at least eight independent

---

filed in the Third Circuit, does not have associational standing, but we do not reach this issue as the Networks have not formally contested Prometheus' standing.

"voices." Specifically, in counting how many independent voices existed in a market area, the FCC only counted TV stations, thereby excluding radio stations, newspapers and cable systems. *Sinclair*, 284 F.3d at 163-165. The D.C. Circuit Court found that the FCC had not adequately justified this limitation on the voices pool as necessary for the public interest, and remanded the rule to the FCC for a more persuasive justification. *Id.*

We conclude that the issues in the case before us are not closely related enough to warrant transfer to the D.C. Circuit. The 2002 Review is an omnibus biennial review of media ownership rules compelled by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, not by *Fox* and *Sinclair*. It is true that at least two rules in the 2002 Review were crafted with *Fox* and *Sinclair* in mind: 1) the 35% cap on national audience reach was increased to 45%; and 2) the number of voices required for two-station ownership was reduced to five, while three-station ownership is now allowed for the largest TV markets. The 2002 Review, however, contains several other rules challenged by the various petitioners, and is, in the FCC's own words, "the most comprehensive look at media ownership regulation ever undertaken by the FCC." FCC Initiates Biennial Review of Broadcast Ownership Rules, FCC Document Number 2261988A1 (Sept. 12, 2003). Indeed, the 2002 Review is a statutorily mandated review of media ownership regulations that merely incorporates responses to *Fox* and *Sinclair*.

Moreover, the remand instructions from the D.C. Circuit Court are not the complicated sort that would require special expertise from future reviewing courts. The D.C. Circuit Court simply instructed the FCC to justify its rules on media ownership with an eye to the public interest: this Court is no less qualified than any other Court of Appeals to determine whether the FCC has appropriately considered the public interest in its decision-making. Furthermore, the remand instructions were general, not the sort of specific mandate

that requires hands-on stewardship by the same judges that issued the prior decision: this fact is underscored by the reality that if this case was transferred to the D.C. Circuit, the adjudicating panel could be composed of an entirely different set of judges than those who decided *Fox* or *Sinclair* (which were not decided by the same panel of judges).

In short, the similarity between *Fox/Sinclair* and this case is highly generalized: they are similar only in the sense that both require examination of whether certain FCC rules (a subset of the rules in the 2002 Review) serve the public interest. If this level of similarity suffices to justify transfer, then all appeals from FCC media ownership rulemaking would effectively be placed before the D.C. Circuit Court. As Citizen Petitioners point out, if Congress had meant to give the D.C. Circuit Court exclusive jurisdiction over such appeals, it would have explicitly done so, in the way that it gave that Court exclusive jurisdiction over FCC licensing decisions. In conclusion, we find that this case is separable and independent from *Fox* and *Sinclair*, and that transfer is therefore unwarranted. The Networks' Motion is therefore DENIED.

Dated: September 15, 2003
nmb/cc: All Counsel of Record

Prometheus Radio Proj. v. FCC and United States, No. 03-3388

SCIRICA, *Chief Judge*, dissenting

I would transfer this matter to the United States Court of Appeals for the District of Columbia.

The consolidated cases at issue were randomly assigned to this Court through a lottery process under 28 U.S.C. § 2112(a)(1), (3). This Court may transfer the cases "[f]or the convenience of the parties in the interest of justice." 28 U.S.C. § 2112(a)(5). Courts have recognized that the initial lottery under § 2112 determines only "which court will determine venue, not which court will ultimately hear the case." *Liquor Salesmen's Union Local 2 v. NLRB*, 664 F.2d 1200, 1205 (D.C. Cir. 1981); *see also City of Gallup v. FERC*, 702 F.2d 1116, 1121 (D.C. Cir. 1983) ("[O]nce all petitions have been consolidated in [the initial] court, it must be determined whether the 'convenience of the parties in the interest of justice' counsels transfer to yet another circuit.").[2]

"In evaluating a transfer motion, a court will consider the policies of sound judicial administration, such as: one circuit's familiarity with the issues and parties from prior litigation; the need for continuity and consistency in reviewing a series of agency decisions; and, the facilitation of judicial economy." *Abourezk v. FPC*, 513 F.2d 504, 505 n.1 (D.C. Cir. 1975). When considering a motion to transfer, our own Court has given weight to the "desirability of concentrating litigation over closely related issues in the same forum so as to avoid duplication of judicial effort."

---

[2] Prometheus argues that its choice of forum in which to litigate favors maintaining jurisdiction in this Court. This factor is of diminished significance in light of the lottery procedure under § 2112. Prometheus' choice of forum should not be afforded greater significance than that of any other party that filed a petition for review during the 10-day lottery period.

United Steelworkers of America, AFL-CIO v. Marshall, 592 F.2d 693, 697 (3d Cir. 1979).

Sound judicial administration and consistency favor transferring this matter to the D.C. Circuit. Tied to these principles is the fundamental jurisprudential underpinning that agency decisions on remand should be reviewed by the remanding court. *See Public Serv. Comm'n v. FPC*, 472 F.2d 1270, 1272 (D.C. Cir. 1972) (Transfer is appropriate where "the same or inter-related proceeding was previously under review in a court of appeals, and is now brought for review of an order entered after remand, or in a follow-on phase, where continuance of the same appellate tribunal is necessary to maintain continuity in the total proceeding."). Because the FCC order at issue, at least in part, was on remand from a sister circuit, this principle, grounded in comity, presents the most fundamental ground for transfer of the consolidated cases.

The FCC promulgated its order, 2002 Biennial Regulatory Review, 68 Fed.Reg. 46, 286 (Aug. 5, 2003), as required by the Telecommunications Act of 1996. Publ.L. No. 104-104, 110 Stat. 56 (1996). But the order was also promulgated with explicit directives from the D.C. Circuit. *In Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002), and *Sinclair Broadcasting Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002), the D.C. Circuit considered the national and local television ownership rules whose promulgation after remand is at issue in the consolidated cases. Though the challenged order modified four additional rules not at issue in those cases, *Fox* and *Sinclair* are critical.

The D.C. Circuit interpreted the language and purpose of 47 U.S.C. § 202(h) to contain a "presumption in favor of repealing or modifying the ownership rules." See *Fox*, 280 F.3d at 1048; *Sinclair*, 284 F.3d at 164. The court faulted the FCC for taking an impermissible "wait and see" approach. *Fox*, 280 F.3d at 1042. Specifically, the *Fox* court remanded the national television ownership rule, in part, because the

FCC failed to provide an "analysis of the state of competition in the television industry." *Id.* at 1044. In *Sinclair*, the court held that the FCC had "failed to demonstrate that its exclusion of non-broadcast media in the eight voices exception is not arbitrary and capricious." 284 F.3d at 152. The D.C. Circuit cited the deficiencies of the FCC's prior orders and provided specific instructions for promulgating the order now at issue in the consolidated cases.

As noted, in promulgating all of the rules in the challenged order, the FCC was directed to follow and implement a mandate from the D.C. Circuit. Whether the agency decision on remand remedied these short-comings and faithfully carried out the court's directive will be part of this appeal. As the court that issued the remand, the D.C. Circuit is best positioned to construe the scope of its mandate and evaluate the agency's response. *See e.g., Arkansas Midland R.R. v. STB*, 2000 U.S. App. LEXIS 18003, at *2 (D.C. Cir. June 8, 2000) ("[T]he same or interrelated proceedings were previously under review in the Eighth Circuit Court of Appeals, and petitioner is now seeking review of an order entered, in part, on remand from the Eighth Circuit. Transfer to the Eighth Circuit, therefore, is appropriate 'for the convenience of the parties in the interest of justice.'").

Interest of continuity and consistency in reviewing a series of related agency decisions favor transfer of the consolidated cases to the D.C. Circuit as well. The relationship between the consolidated cases and *Fox* and *Sinclair* is "sufficiently close for the interest in consistent results to come into play." *ITT World Communications, Inc. v. FCC*, 621 F.2d 1201, 1208 (D.C. Cir. 1980).

Construing a prior order of another circuit may cause inter-circuit tension and raises the prospect of inconsistent decisions, both of which should be avoided if possible. Absent a transfer, "the peculiarly undesirable possibility of conflicting results," *Spencer v. Kugler*, 454 F.2d 839, 847 (3d Cir. 1972), and concomitant inconsistent mandates to the

agency, could occur. For example, if this Court were to remand the order at issue, the agency could be placed in the unenviable position of rewriting rules in accordance with two potentially divergent directives. Conversely, when a remanded order is reviewed in the issuing court, consistent results are more likely.

In addition to the prospect of conflicting decisions on remand, the importance of consistency is particularly relevant for at least one other reason. Congress has vested the D.C. Circuit with exclusive authority to review FCC grants and denials of applications to construct new radio and television stations or to assign or transfer control of licenses for existing stations. 47 U.S.C. § 402(b)(1)-(3). The D.C. Circuit is also the exclusive forum for appeals brought by any party "adversely affected by any order of the Commission" granting or denying station licensing or construction applications. 47 U.S.C. § 402(b)(6). These appeals of agency decisions may overlap with the issues raised by this appeal, highlighting the need for consistent results.

Based on the foregoing reasons, I would transfer the consolidated cases for reasons of comity and sound judicial administration.

(3)

Supreme Court, U.S.
FILED

041020 JAN 28 2005

No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MEDIA GENERAL, INC.

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

APPENDIX VOLUME II

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CONTENTS

Document **Page**

VOLUME I

United States Court of Appeals for the Third Circuit

Majority Opinion (June 24, 2004) 1a
Dissenting Opinion 107a

Order Denying Petition for Rehearing
(Sept. 3, 2004) 191a

Order Granting Stay (Sept. 3, 2003) 194a

Order Denying Transfer (Sept. 15, 2003) 197a

VOLUME II

Federal Communications Commission

Report and Order 206a

VOLUME III

Report and Order (continued) 486a
Notice of Proposed Rulemaking 652a

Statement of Chairman Powell 663a

Statement of Commissioner Abernathy 666a

Statement of Commissioner Martin 673a

Dissenting Statement of Commissioner Copps 677a

Dissenting Statement of Commissioner Adelstein 714a

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	MB Docket 02-277
Cross-Ownership of Broadcast Stations and Newspapers	MM Docket 01-235
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	MM Docket 01-317
Definition of Radio Markets	MM Docket 00-244
Definition of Radio Markets for Areas Not Located in an Arbitron Survey Area	MB Docket 03-130

REPORT AND ORDER AND NOTICE OF PROPOSED RULEMAKING

Adopted: June 2, 2003 **Released:** July 2, 2003

Comments due: 30 days after publication in the Federal Register
Reply Comments due: 45 days after publication in the Federal Register

By the Commission: Chairman Powell, Commissioners Abernathy and Martin issuing separate statements; Commissioners Copps and Adelstein dissenting and issuing separate statements.

TABLE OF CONTENTS

[Page] Paragraph

I. INTRODUCTION.....[209a] 1
II. LEGAL FRAMEWORK .....[214a] 10
III. POLICY GOALS.....[219a] 17
A. Diversity .....[219a] 18
B. Competition.....[237a] 53
C. Localism .....[248a] 73
D. Regulatory Certainty .....[251a] 80
IV. MODERN MEDIA MARKETPLACE.....[255a] 86
A. Introduction – The Evolution of Media.....[255a] 86
B. History of the Modern Media Marketplace...[258a] 90
V. LOCAL AND NATIONAL FRAMEWORK .....[288a] 129
VI. LOCAL OWNERSHIP RULES .....[289a] 132
A. Local TV Multiple Ownership Rule.....[289a] 132

B. Local Radio Ownership Rule .....[367a] 235
C. Cross Ownership .....[430a] 327
D. Grandfathering and Transition Procedures .[538a] 482
VII. NATIONAL OWNERSHIP RULES .....[552a] 499
A. National TV Ownership Rule.....[552a] 500
B. Dual Network Rule.....[610a] 592
VIII. MISCELLANEOUS REQUESTS .....[629a] 622
IX. NOTICE OF PROPOSED RULEMAKING .....[648a] 657
X. ADDITIONAL ADMINISTRATIVE MATTERS[655a] 671
XI. ORDERING CLAUSES .....[656a] 674
[Appendices A-I omitted]

I. INTRODUCTION

1. With this Report and Order ("*Order*"), we bring to completion our third biennial ownership review, the most extensive review yet, addressing all six broadcast ownership rules. We address these rules in light of the mandate of Section 202(h) of the Telecommunications Act of 1996 ("1996 Act"), which requires the Commission to reassess and recalibrate its broadcast ownership rules every two years.[1] In the Notice of Proposed Rulemaking in this proceeding ("*Notice*"),[2] we initiated review of four ownership rules: the national television multiple ownership rule;[3] the local television multiple ownership rule;[4] the radio-television cross-ownership rule;[5] and

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[1] Telecommunications Act of 1996, Pub. L. No. 104-104; 110 Stat. 56 (1996).

[2] *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross-Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets*, 17 FCC Rcd 18503 (2002) ("*Notice*").

[3] 47 C.F.R. § 73.3555(e) (prohibiting any entity from controlling television stations the audience reach of which exceeds 35% of television households in the United States). For a definition of what constitutes an attributable interest for purposes of applying our multiple ownership rules, *see* notes to 47 C.F.R. § 73.3555.

[4] 47 C.F.R. § 73.3555(b) (allowing the combination of two television stations in the same Designated Market Area ("DMA"), as determined by Nielsen Media Research or any successor entity, provided: (1) the Grade B contours of the stations do not overlap; or (2) (a) at least one of the stations is not among the four highest-ranked stations in the market, and (b) at least eight independently owned and operating full power commercial and noncommercial television stations would remain in that market after the combination).

[5] 47 C.F.R. § 73.3555(c) (allowing common ownership of one or two TV stations and up to six radio stations in any market in which at least twenty independent "voices" would remain post-combination; two TV stations and up to four radio stations in a market in which at least ten independent "voices" would remain post-combination; and one TV and one radio station

the dual network rule.[6] The first two rules have been reviewed and the proceedings remanded to the Commission by the U.S. Court of Appeals for the District of Columbia Circuit.[7] In addition, the Commission previously initiated proceedings on the local radio ownership rule[8] and the newspaper/broadcast cross-ownership rule.[9] Comments filed in those proceedings have been incorporated into this docket along with comments on the rules filed in response to the *Notice*.[10] After we released

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notwithstanding the number of independent "voices" in the market. If permitted under the local radio ownership rules, where an entity may own two commercial TV stations and six commercial radio stations, it may own one commercial TV station and seven commercial radio stations. For this rule, a "voice" includes independently owned and operating same-market, commercial and noncommercial broadcast TV stations, radio stations, independently owned daily newspapers, and cable systems (all cable systems within the DMA are counted as a single voice)).

[6] 47 C.F.R. § 73.658(g) (permitting a television broadcast station to affiliate with a network that maintains more than one broadcast network, unless the dual or multiple networks are created by a combination between ABC, CBS, Fox, or NBC).

[7] *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1044 (D.C. Cir. 2002) ("*Fox Television*"), *rehearing granted*, 293 F.3d 537 (D.C. Cir. 2002) ("*Fox Television Re-Hearing*") (addressing the national TV ownership rule). *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002) ("*Sinclair*") (addressing the local TV ownership rule).

[8] *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, 16 FCC Rcd 19861 (2001) ("*Local Radio Ownership NPRM*"); *Definition of Radio Markets*, 15 FCC Rcd 25077 (2000) ("*Definition of Radio Markets NPRM*"). The local radio ownership rule limits the number of radio stations that an entity may own in a single market. 47 C.F.R. § 73.3555(a).

[9] *Cross-Ownership of Broadcast Stations and Newspapers*, 16 FCC Rcd 17283 (2001) ("*Newspaper/Broadcast Cross-Ownership NPRM*"). The newspaper/broadcast cross-ownership rule prohibits the common ownership of a daily newspaper and a broadcast station in the same market. 47 C.F.R. § 73.3555(d).

[10] Short references to commenters' names are contained in the list of commenters attached as Appendix A.

the *Notice*, we issued 12 Media Ownership Working Group ("MOWG") studies for public comment.[11]

2. In this *Order* we review the legal context within which this review is conducted, identify and describe the public interest policy goals that guide our decision, assess changes in the media marketplace over time, repeal some rules, modify others, and adopt some new rules. In consideration of the record and our statutory charge, we conclude that neither an absolute prohibition on common ownership of daily newspapers and broadcast outlets in the same market (the "newspaper/broadcast cross-ownership rule") nor a cross-service restriction on common ownership of radio and television outlets in the same market (the "radio-television cross-ownership rule") remains necessary in the public interest. With respect to both of these rules, we find that the ends sought can be achieved with more precision and with greater deference to First Amendment interests through our modified Cross Media Limits ("CML"). We also revise the market definition and the way we count stations for purposes of the local radio rule, revise the local television multiple ownership rule, modify the national television ownership cap, and retain the dual network rule.

3. The changes described herein provide a new, comprehensive framework for broadcast ownership regulation. As described in detail below, Americans today have more media choices, more sources of news and information, and more varied entertainment programming available to them than ever before. A generation ago, only science fiction writers dreamed of satellite-delivered television, cable was little more than a means of delivering broadcast signals to remote

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[11] *FCC Seeks Comment on Ownership Studies Released by Media Ownership Working Group and Establishes Comment Deadlines for 2002 Biennial Regulatory Review of Commission's Ownership Rules*, 17 FCC Rcd 19140 (2002). *See* www.fcc.gov/ownership for the public notice, a summary of the studies, and the studies themselves.

locations, and the seeds of the Internet were just being planted in a Department of Defense project. Today, hundreds of channels of video programming are available in every market in the country and, via the Internet, Americans can access virtually any information, anywhere, on any topic.

4. Nonetheless, while the march of technology has brought to our homes, schools, and places of employment unprecedented access to information and programming, our broadcast ownership rules, like a distant echo from the past, continue to restrict who may hold radio and television licenses as if broadcasters were America's information gatekeepers. Our current rules inadequately account for the competitive presence of cable, ignore the diversity-enhancing value of the Internet, and lack any sound basis for a national audience reach cap. Neither from a policy perspective nor a legal perspective can rules premised on such a flawed foundation be defended as necessary in the public interest. Not surprisingly, therefore, several of the existing rules have been questioned, reversed, and in some cases vacated by the courts. Our current rules are, in short, a patchwork of unenforceable and indefensible restrictions that, while laudable in principle, do not serve the interests they purport to serve.

5. Inaction on our part and the market uncertainty that would result from a perpetuation of the open-ended policy limbo that exists today would ill serve our nation. The adoption of this *Order* is critical, therefore, to the realization of our public interest goals in that it puts an end to any uncertainty regarding the scope and effect of our structural broadcast ownership rules. Most importantly, the rules discussed and described below serve our competition, diversity and localism goals in highly targeted ways and, working together, form a comprehensive framework that is responsive to today's media environment.

6. We adopt herein limits both for local radio and local television station ownership. Both of these rules are premised

on well-established competition theory and are intended to preserve a healthy and robust competition among broadcasters in each service. As explained below, however, because markets defined for competition purposes (*i.e.*, defined in terms of which entities compete with each other in economic terms) are generally more narrow than markets defined for diversity purposes (*i.e.*, defined in terms of which entities compete in the dissemination of ideas), our ownership limits on radio and television ownership also serve our diversity goal. By ensuring that several competitors remain within each of the radio and television services, we also ensure that a number of independent outlets for viewpoint will remain in every local market, thereby protecting diversity. Further, though, because local television and radio ownership limits cannot protect against losses in diversity that might result from combinations of different types of media within a local market, we adopt below a set of specific cross-media limits.

7. Similarly, by virtue of the staff's extensive information gathering efforts and the voluminous record assembled in this rulemaking docket, we have for the first time substantial evidence regarding the localism effects of our national broadcast ownership rules. We can, therefore, with more confidence than ever, establish a reasonable limit on the national station ownership reach of broadcast networks. In addition, under our dual network rule, we continue to prohibit a combination between two of the largest four networks primarily on competition grounds, but the beneficial effects of this restriction also protect localism. In combination, our new national broadcast ownership reach cap and our "dual network" prohibition will ensure that local television stations remain responsive to their local communities.

8. In sum, the modified broadcast ownership structure we adopt today will serve our traditional goals of promoting competition, diversity, and localism in broadcast services. The new rules are not blind to the world around them, but reflective

of it; they are, to borrow from our governing statute, necessary in the public interest.

9. We received more than 500,000 brief comments and form letters from individual citizens. These individual commenters expressed general concerns about the potential consequences of media consolidation, including concerns that such consolidation would result in a significant loss of viewpoint diversity and affect competition. We share the concerns of these commenters that our ownership rules protect our critical diversity and competition goals, as they are designed to do, and we believe that the rules adopted herein serve our public interest goals, take account of and protect the vibrant media marketplace, and comply with our statutory responsibilities and limits. As we make plain in the *Order* below, we have assessed and recalibrated our rules to form a local and national rules framework that promotes diversity, competition and localism, the core concerns of these commenters, and we will address these core concerns in each section of this *Order* as we address each of our ownership rules.

II. LEGAL FRAMEWORK

10. We conduct this biennial ownership review within the framework established by Section 202(h) of the 1996 Act, which provides:

> The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.[12]

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[12] 1996 Act, § 202(h).

11. Two aspects of this statutory language are particularly noteworthy. First, as the court recognized in both *Fox Television* and *Sinclair*, "Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules."[13] That is, Section 202(h) appears to upend the traditional administrative law principle requiring an affirmative justification for the modification or elimination of a rule.[14] Second, Section 202(h) requires the Commission to determine whether its rules remain "necessary in the public interest."[15]

12. As described below, we conclude that in its current form only the dual network rule remains necessary in the public interest as a result of competition. We also conclude that the other ownership rules should be modified as described in this *Order*.

13. *The First Amendment*. The ownership rules we adopt in this proceeding must be consistent not only with the legal standard in Section 202(h), but also with the First Amendment rights of affected media companies and consumers. We conclude, based on the decisions in the *Fox Television* and *Sinclair* cases, that the rational basis standard is the correct First Amendment standard to apply to the broadcast ownership rules.[16] In so doing, we reject, as did the court, the application

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[13] *Fox Television*, 280 F.3d at 1048; *Sinclair*, 284 F.3d at 159. Several parties, citing *Fox Television* and *Sinclair*, support the notion that Section 202(h) presumptively favors repeal or modification of the ownership rules. *See, e.g.*, Bonneville Comments at 3; Fox Comments at Exhibit I; Morris Comments at 4; Tribune Comments at 12-13; Fox Reply Comments at 4; NAB Reply Comments at 2-3.

[14] 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfgs. of the United States v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983).

[15] *See 2002 Biennial Regulatory Review*, 18 FCC Rcd 4726, 4730 ¶ 13 (2003).

[16] *Fox Television*, 280 F.3d at 1027; *Sinclair*, 284 F.3d at 148. In the *1998 Biennial Review Report*, the Commission applied the *O'Brien*, or intermediate scrutiny, test to the newspaper/broadcast cross-ownership rule. *1998 Biennial Regulatory Review of the Commission's Broadcast Ownership*

of the intermediate scrutiny ("*O'Brien*") standard[17] applicable to cable operators[18] or the strict scrutiny standard applicable to the print media and to content-based regulations.[19] Under the rational basis standard, the Commission's broadcast regulations

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Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 15 FCC Rcd 11058, 11121-22 ¶¶ 116-18 (2000) ("*1998 Biennial Review Report*") (applying *United States v. O'Brien*, 391 U.S. 367 (1968) ("*O'Brien*")). Also, in considering the application of the First Amendment to the newspaper/broadcast cross-ownership rule, in the *Newspaper/Broadcast NPRM*, which was released before the *Fox Television* and *Sinclair* cases, we asked about the significance of *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001), *cert. denied*, 122 S.Ct. 644 (2001) ("*Time Warner II*"), in which intermediate scrutiny was applied to cable regulations. *Newspaper/Radio Cross-Ownership NPRM*, 16 FCC Rcd at 17296-97 ¶¶ 31-33. The decisions in the *Fox Television* and *Sinclair* cases have settled these issues.

[17] Under *O'Brien*, government regulation of speech will be upheld only if: (1) it furthers an important or substantial governmental interest; (2) the interest is unrelated to the suppression of free expression; and (3) the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest. *O'Brien*, 391 U.S. at 377-78; *Turner Broadcasting System v. FCC*, 520 U.S. 180, 185-86 (1997) ("*Turner II*").

[18] In general, ownership limits on cable operators have been subject to the *O'Brien* test. *Time Warner Entertainment Co. v. United States*, 211 F.3d 1313, 1316-22 (D.C. Cir. 2000) ("*Time Warner I*"), *cert. denied*, 121 S. Ct. 1167 (2001); *Satellite Broadcasting & Commun. Ass'n v. FCC*, 275 F.3d 337, 346, 355 (4th Cir. 2001), *cert. denied* 122 S. Ct. 2588 (2002). The Supreme Court has determined that "promoting the widespread dissemination of information from a multiplicity of sources" is a government interest that is not only important, but is of the "highest order" and is unrelated to the suppression of free speech. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662-63 (1984) ("*Turner I*"); *Turner II*, 520 U.S. at 190. On the other hand, the Commission may not burden cable operators' speech with "illimitable restrictions in the name of diversity." *Time Warner II*, 240 F.3d at 1136.

[19] Strict scrutiny First Amendment analysis would require the Commission to demonstrate that its rules are the "least restrictive means available of achieving a compelling state interest." *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989).

satisfy the First Amendment if they are "a reasonable means of promoting the public interest in diversified mass communications."[20] As the court noted in *Sinclair*, there is no unabridgeable First Amendment right to hold a broadcast license; would-be broadcasters must satisfy the public interest by meeting the Commission criteria for licensing, including demonstrating compliance with any applicable ownership limitations.[21]

14. In applying the rational basis test, the *Fox* and *Sinclair* courts relied on longstanding Supreme Court precedent which also supports our decision.[22] In *NCCB*, the Supreme Court applied the rational basis test to the Commission's newspaper/broadcast cross-ownership rules, finding that they "are a reasonable means of promoting the public interest in diversified mass communications; thus they do not violate the First Amendment rights of those who will be denied broadcast licenses pursuant to them."[23] The *NCCB* Court explained that the rational basis test is the appropriate standard to govern our broadcast ownership regulations because spectrum scarcity requires "Government allocation and regulation of broadcast frequencies," and because these regulations are not content related.[24] The rational basis standard therefore governs our broadcast ownership regulations, whether they govern those that own only broadcast outlets or those that might seek to combine ownership of a broadcast outlet with a cable system or a newspaper.[25]

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[20] *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 802 (1978) ("*NCCB*").

[21] *Sinclair*, 284 F.3d at 168 (citing *NCCB*, 436 U.S. at 795-97).

[22] *NCCB*, 436 U.S. at 802.

[23] *Id.*

[24] *Id.* at 799, 801.

[25] *See id.* at 798-02 (rational basis test applied to newspaper/broadcast rule); *Fox Television*, 280 F.3d at 1045-46 (rational basis test applied to broadcast-cable cross-ownership ban). Several commenters argue that the Commission

15. We disagree with Media General and Tribune, who argue that our ownership rules affecting newspapers should be judged under strict scrutiny First Amendment analysis. Media General and Tribune claim that spectrum scarcity is no longer a valid rationale for media ownership limits and that our diversity and competition goals are inherently content-based.[26] The goals of promoting diversity and localism do not render our ownership rules content-based. As the Supreme Court noted in *NCCB*, the cross-ownership rules at issue were "not content related; moreover, their purpose and effect is to promote free speech, not to restrict it."[27] Furthermore, the courts have considered and consistently rejected the arguments for a stricter standard of First Amendment scrutiny of broadcast regulation made by commenters here.[28] Accordingly, the rational basis test continues to apply to our ownership rules.

16. First Amendment interests are implicated by any regulation of media outlets, including broadcast media. We endeavor to be sensitive to those interests and to minimize the impact of our rules on the right of speakers to disseminate a message.[29] As discussed below, our decision today to eliminate

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is bound by court decisions to apply the rational basis test to First Amendment review of the broadcast ownership rules. UCC Comments at 63-64; UCC Reply Comments at 25-32; Cox Reply Comments at 4.

[26] *See* Media General Comments at 36-37; Media General Reply Comments at 21-24; Tribune Comments at 18-20.

[27] *NCCB*, 436 U.S. at 801; *see also Fox Television*, 280 F.3d at 1046.

[28] *Fox Television*, 280 F.3d at 1046 (quoting *Turner I*, 512 U.S. at 638).

[29] Several parties comment on the First Amendment principles that should guide our broadcast ownership review. *See, e.g.*, CFA Comments at 30-32 (arguing that diversity of media types promotes vibrant civic discourse and comports with the First Amendment); Noam Schechner Comments at 8-13 (stating that the First Amendment requires the Commission to engage in detailed examination of viewpoint diversity); Sandra M. Ortiz Comments at 12 (arguing that safeguarding the First Amendment rights of the public permits restriction of media ownership); Prairie Reply Comments at 2-3 (arguing that the availability of diverse and local information is crucial to the

the newspaper/broadcast cross-ownership rule and the radio-television cross-ownership rule, and to modify our other local ownership rules and our national audience reach cap, turns in part on our determination that these rules in their current form are not a reasonable means to accomplish the public interest purposes to which they are directed. We turn next to identifying the policy goals that will inform this determination.

III. POLICY GOALS

17. In the *Notice*, we sought comment on the policy objectives that should guide our actions in regulating media ownership. We identified diversity, competition, and localism as longstanding goals that would continue to be core agency objectives in this area.[30] We requested comment on how these goals should be defined and measured, and on whether other goals should be added to these three overarching objectives. To fulfill our biennial review obligation, we will first define our goals and the ways we will measure them. We can then assess whether our current broadcast ownership rules are necessary to achieve these goals.

A. Diversity

18. There are five types of diversity pertinent to media ownership policy: viewpoint, outlet, program, source, and minority and female ownership diversity. We discuss them in turn.

1. Viewpoint Diversity

19. *Background.* Viewpoint diversity refers to the availability of media content reflecting a variety of perspectives. A diverse and robust marketplace of ideas is the foundation of our democracy.[31] Consequently, "it has long

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spirit of the First Amendment).

[30] *Notice*, 17 FCC Rcd at 18516-27 ¶¶ 33-71.

[31] *See* Richard Brown, *Early American Origins of the Information Age*, A NATION TRANSFORMED BY INFO.: HOW INFORMATION HAS SHAPED U.S. FROM COLONIAL TIMES TO THE PRESENT (Oxford Univ. Press, New York,

been a basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[32] This policy is given effect, in part, through regulation of broadcast ownership.

20. Because outlet owners select the content to be disseminated, the Commission has traditionally assumed that there is a positive correlation between viewpoints expressed and ownership of an outlet. The Commission has sought, therefore, to diffuse ownership of media outlets among multiple firms in order to diversify the viewpoints available to the public. Prior Commission decisions limiting broadcast ownership concluded that a larger total number of outlet owners increased the probability that their independent content selection decisions would collectively promote a diverse array of media content.[33]

21. The *Notice* sought comment on whether this longstanding presumed link between ownership and viewpoint could be established empirically.[34] The record evidence on this point includes a study by Professor David Pritchard, which

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NY, 2000) at 44-49 *passim* ("Because people widely believed that their republican government required an informed citizenry, they scrambled to make sure that they, and often their neighbors, were properly informed.").

[32] *Turner I*, 512 U.S. at 663-64 (internal quotation marks omitted) (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972) (plurality opinion) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

[33] *See, e.g., Rules and Regulations Relating to Multiple Ownership*, 18 FC.C. 288 (1953) ("[T]he fundamental purpose of this facet of the multiple ownership rules is to promote diversification of ownership in order to maximize diversification of program and service viewpoints..."); *Amendment of Sections 73.74, 73.240 & 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM & Television Broadcast Stations*, 50 F.C.C.2d 1046, 1079-80 (1975) ("*1975 Multiple Ownership Second Report and Order*").

[34] *Notice*, 17 FCC Rcd at 18519-20 ¶ 44.

examined whether ownership affects the viewpoint expressed on commonly-owned television stations and daily newspapers.[35] The study evaluated how ten television-newspaper combinations covered the final weeks of the 2000 presidential election to see whether commonly-owned outlets exhibited common "viewpoints" through their coverage of the election. The two theoretical extremes for the news stories in question were 100 percent pro-Gore and 100 percent pro-Bush. When news coverage on two commonly-owned outlets was sufficiently similar on the continuum between these two points, the study deemed those two outlets to exhibit a common editorial viewpoint.[36] The study concluded that five of the ten television-newspaper combinations exhibited common editorial slants, and that the other five combinations did not. The basis for this conclusion was the "distance" on a continuum between the coverage of the campaign by the television station and the newspaper. Professor Pritchard concluded that "common ownership of a newspaper and a television station in a community does not result in a predictable pattern of news coverage and commentary."[37]

22. Some commenters agree. Belo and Media General contend that separating ownership of media outlets to achieve diverse viewpoints is unnecessary for two reasons. First, Belo and Media General assert that their news outlets do not express viewpoints, but provide balanced news coverage in response to consumer preferences.[38] They contend that viewers would reject local newscasts having a perceived bias and would turn to other news sources. Second, both companies explain that

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[35] MOWG Study No. 2, Viewpoint Diversity in Cross-Owned Newspapers and Television Stations: A Study of News Coverage of the 2000 Presidential Campaign by David Pritchard (Sept. 2002) ("MOWG Study No. 2").

[36] *Id.* at n.15.

[37] *Id.* at 12-13.

[38] Belo Comments, Statement of Robert Dechard at 3; Media General Reply Comments, Statement of J. Stewart Bryan III, at 2.

each outlet under common control has editorial independence and is not subject to top-down news policies from their corporate parents.[39] Declarations submitted by the Chief Executive Officers of Belo and Media General assert that their companies' ability to succeed in the marketplace is directly tied to their objectivity in selecting and reporting news.

23. Others challenge Dr. Pritchard's conclusion. CFA and UCC assert that the Pritchard study is flawed by the absence of a control group of independently-owned newspapers and television stations with which to compare the tested stations.[40] In addition, they reject the study because, they say, the sample size was too small from which to draw inferences. UCC also claims that the study's categorization of a particular news item as "pro-Gore" or "pro-Bush" was subjective and ill-defined.[41]

24. CFA cites two studies in support of its view that ownership affects viewpoint. The first examined newspaper coverage of 60 senatorial campaigns across three election cycles and found that "information on news pages was slanted in favor of the candidates endorsed on the newspaper's editorial pages."[42] The second examined newspaper coverage of Congress's decision to allocate spectrum for digital television by newspaper firms that also owned television stations. According to CFA, newspaper-television firms earning 20 percent or less of their revenue from television uniformly editorialized against the spectrum allocation, while those

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[39] Belo Comments, Dechard Statement at 3-4; Belo Comments, Bryan Statement at 2-3.

[40] CFA Comments at 47 n.68; Center for Economic and Policy Research Comments at 5-6

[41] UCC Comments at 11-12.

[42] CFA Comments at 41 (quoting Kim Fridkin Kahn and Patrick J. Kenny, *The Slant of the News: How Editorial Endorsements Influence Campaign Coverage and Citizens' Views of Candidates*, American Political Science Review, 96 (2002) at 381).

earning more than 20 percent of their revenues from television uniformly editorialized in favor of the allocation.[43]

25. A second way in which ownership may affect viewpoint is self-censorship by journalists and editors. UCC submitted a survey by the Pew Research Center which found that 41 percent of reporters and executives employed by the four broadcast networks said they "purposely avoided newsworthy stories and/or softened the tone of stories to benefit the interests of their news organizations."[44] UCC also refers us to anecdotal evidence that the editorial decisions of the broadcast networks have been affected by their financial interests.[45] Similarly, the Writers Guild suggests that newspaper writers and editors select and write stories, with a bias in favor of satisfying the views of their owner.[46] CFA and UCC also cite studies showing that media companies news decisions are affected by pressure from advertisers.[47]

26. *Discussion.* We adhere to our longstanding determination that the policy of limiting common ownership of multiple media outlets is the most reliable means of promoting viewpoint diversity. Nothing in the record causes us to reconsider this conclusion. The principal record evidence

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[43] *Id.* at 43 (citing James H. Snider and Benjamin I. Page, *Does Media Ownership Affect Media Stands? The Case of the Telecommunications Act of 1996*, paper delivered at the Annual Meeting of the Midwest Political Science Assn. (Apr. 1997).

[44] UCC Comments at 4 (citing Pew Research Center for the People & the Press, *Self Censorship: How Often and Why, Survey Reports* (rel. Apr. 30, 2000) available at www.people-press.org/reports/display.php3?ReportID=39.

[45] Dmitri Williams, *Synergy Bias: Conglomerates and Promotion in the News*, 46 J. OF B'CASTING & ELEC. MEDIA 453 (Sept. 1, 2002).

[46] Writer's Guild Comments at 8-9.

[47] CFA Comments at 44-45 (citing Marion Just, Rosalind Levine and Kathleen Regan, *News for Sale: Half of Stations Report Sponsor Pressure on News Decisions*, COLUM., J. REV. (Project for Excellence in Journalism Nov./Dec. 2001) at 2).

purporting to demonstrate a lack of connection between ownership and viewpoint – the Pritchard study -- contains a significant methodological flaw. The study did not employ a control group to compare with the test set of commonly-owned outlets. The absence of a baseline control group in this study precludes us from placing significant probative value on this study's assessment of ownership and viewpoint.

27. Indeed, the balance of the evidence, although not conclusive, appears to support our conclusion that outlet ownership can be presumed to affect the viewpoints expressed on that outlet. We therefore continue to believe that broadcast ownership limits are necessary to preserve and promote viewpoint diversity. A larger number of independent owners will tend to generate a wider array of viewpoints in the media than would a comparatively smaller number of owners. We believe this proposition, even without the benefit of conclusive empirical evidence, remains sound.[48]

28. Further, owners of media outlets clearly have the ability to affect public discourse, including political and governmental affairs, through their coverage of news and public affairs. Even if our inquiry were to find that media outlets exhibited no apparent "slant" or viewpoint in their news coverage, media outlets possess significant *potential* power in our system of government. We believe sound public policy requires us to assume that power is being, or could be, exercised.

29. We also disagree with Belo and Media General that local ownership restrictions are unnecessary to promote diversity because financial incentives will keep local newscasts unbiased. First, media companies may have multiple financial

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[48] *NCCB*, 436 U.S. at 797 ("[T]he Commission was entitled to rely on its judgment, based on experience, that 'it is unrealistic to expect true diversity from a commonly-owned station-newspaper combination. The divergency of their viewpoints cannot be expected to be the same as if they were antagonistically run.'"); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 571 n.16 (1990); *Sinclair*, 284 F.3d at 162.

incentives that drive news decisions, and avoiding an appearance of bias is only one such financial incentive. Record evidence suggests that media companies' handling of the digital spectrum issue was affected by the extent of the company's financial interest in that issue.[49] Second, there may be factors in news coverage decisions that are unaccounted for in the Belo/Media General argument regarding financial incentives. The record contains evidence that reporters and other employees of broadcasting companies alter their news coverage to suit their companies' interests.[50] This suggests that whatever financial interest that media companies may have in presenting unbiased news coverage, those incentives are not the only factors that explain news coverage decisions. Consequently, we cannot agree with Belo and Media General that diverse ownership is wholly unnecessary to ensure diverse perspectives on the news.

30. Lest this finding be misconstrued, we do not pass judgment on the desirability of owners using their outlets for the expression of particular viewpoints. Indeed, we have always proceeded from the assumption that they do so and that our rules should encourage diverse ownership precisely because it is likely to result in the expression of a wide range of diverse and antagonistic viewpoints. We merely observe here that evidence from a variety of researchers and organizations appears to disclose a meaningful connection between the identity of the outlet owner and the content delivered via its outlet(s). This evidence provides an additional basis to reaffirm our longstanding conclusion that regulating ownership is an appropriate means to promote viewpoint diversity.

31. Our conclusion also should not be read to suggest that each and every incremental increase in the number of different outlet owners can be justified as necessary in the public

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[49] Williams, *supra* note 45.

[50] *See supra*, note 44.

interest. To the contrary, there certainly are points of diminishing returns in incremental increases in diversity.[51] Moreover, such increases may, in some instances, harm the public interest in localism and competition.[52] The balancing of these interests we address in the sections below dealing with individual rules.

32. *Measuring Viewpoint Diversity.* Viewpoint diversity is a paramount objective of this Commission because the free flow of ideas under-girds and sustains our system of government. Although all content in visual and aural media have the potential to express viewpoints, we find that viewpoint diversity is most easily measured through news and public affairs programming. Not only is news programming more easily measured than other types of content containing viewpoints, but it relates most directly to the Commission's core policy objective of facilitating robust democratic discourse in the media. Accordingly, we have sought in this proceeding to measure how certain ownership structures affect news output.

33. Nonetheless, we agree with Fox and CFA that content other than traditional newscasts also contributes to a diversity of viewpoints.[53] Television shows such as *60 Minutes*, *Dateline NBC*, and other newsmagazine programs routinely address matters of public concern. In addition, as Fox points out, entertainment programming such as *Will & Grace*, *Ellen*, *The Cosby Show*, and *All in the Family* all involved characters and storylines that addressed racial and sexual stereotypes. In so doing, they contributed to a national dialogue on important social issues.

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[51] *Time Warner II*, 240 F.3d at 1135 (questioning the point at which a marginal increase in diversity no longer qualifies as an "important" governmental interest).

[52] *See, e.g.*, Cross-Ownership Section VI(C)(1)(b), *infra*, regarding the localism benefits of relaxing the newspaper-broadcast cross-ownership ban.

[53] CFA Comments at 27-28; Fox Comments at 8-9.

34. Although we agree that entertainment programs can contribute to our goal of viewpoint diversity, we will focus on the news component of viewpoint diversity where the record permits us to do so. Our objective of promoting program diversity in this proceeding subsumes the viewpoint diversity contained within entertainment programming. We address our policy goal of program diversity in the following subsection.

35. Finally, we conclude that the diversity of viewpoints by national media on national issues is greater than that regarding local issues. This is principally due to the vast array of national news sources available on the Internet, cable television and DBS.[54]

2. Program Diversity

36. We conclude that program diversity is a policy goal of broadcast ownership regulation. Program diversity refers to a variety of programming formats and content. With respect to television, this includes dramas, situation comedies, reality shows, and newsmagazines, as well as targeted programming channels such as food, health, music, travel, and sports. With respect to radio, program diversity would be reflected in a variety of music formats such as jazz, rock, and classical as well as all-sports and all-news formats. Programming aimed at various minority and ethnic groups is an important component of program diversity for both television and radio.

37. In general, we find that program diversity is best achieved by reliance on competition among delivery systems rather than by government regulation. The rules adopted in this proceeding will ensure competition in the delivered video and radio programming markets. Programming is an input to the retail product offered by competing delivery systems. As long as the broadcast markets remain competitive, we expect program diversity to be best achieved by relying on media companies responding to consumer preferences. Delivery

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[54] See Appendix B, National News Sources.

systems compete fiercely for consumer attention and have powerful financial incentives to tailor their program offerings to serve consumers' diverse demands for programming.

3. Outlet Diversity

38. In the *Notice*, we requested comment on the definition of "outlet diversity" and whether it should be a goal of media ownership policy. Outlet diversity simply means that, in a given market, there are multiple independently-owned firms. The question is whether diversification of outlet ownership *by itself* is a policy goal. We have previously found that outlet diversity has not been viewed as an end in itself, but a means through which we seek to achieve our goal of viewpoint diversity.[55] As we have explained, "the greater the diversity of ownership in a particular area, the less chance there is that a single person or group can have an inordinate effect, in a political, editorial, or similar programming sense, on public opinion at the regional level."[56]

39. We find that independent ownership of outlets by multiple entities in a market contributes to our goal of promoting viewpoint. Regulating the ownership of outlets to achieve those goals is far preferable to attempting to engineer outcomes directly, because ownership regulation reduces the need for the Commission to make subjective judgments about program content.

40. However, our review of the record persuades us that outlet diversity within radio broadcasting continues to be an important aspect of the public interest that we should seek to promote. We are committed to establishing a regulatory

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[55] *Notice*, 17 FCC Rcd at 18517 ¶ 36; *Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules*, 4 FCC Rcd 1723, 1724 ¶ 7 (1989) ("*1989 Multiple Ownership Report and Order*").

[56] *Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations*, 45 F.C.C. 1476, 1477 ¶ 3 (1964) ("*1964 Media Ownership Report and Order*").

framework that promotes innovation in the field of broadcasting. Innovation is not just a matter of preserving a "magic number" of independent owners in a market. Such a scheme would ignore the fact that the most potent sources of innovation often arise not from incumbents but from new entrants.[57] We seek therefore to establish a regulatory regime that preserves opportunities for new entry into the broadcast industry. Although our interest in promoting new entry extends to all broadcasting, that interest is greatest in radio broadcasting. Radio remains one of the most affordable means by which a potential new entrant can enter the media business.[58] Radio thus is a likely foothold through which a new entrant can gain the experience necessary to operate and grow a successful media enterprise.

41. Finally, we believe that one benefit of outlet diversity is the promotion of public safety. The rules we adopt to promote competition, diversity, and localism also will serve the public interest by ensuring that multiple owners control the broadcasting outlets in any market. In an emergency, the separation of broadcast facilities and personnel among multiple independent broadcast companies in a given market will avoid any possibility that the failure of one broadcast company to transmit critical public safety information will not leave that area without other broadcast owners to perform that service.

4. Source Diversity

42. "Source diversity" refers to the availability of media content from a variety of content producers. The *Notice* explained that source diversity can contribute to our "retail"

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[57] *See, e.g., 1998 Biennial Regulatory Review – Testing New Technology*, 14 FCC Rcd 6065, 6077 ¶ 28 (1999).

[58] A review of radio station sales in the past 16 years shows that the average sale price of a radio station is $5.74 million dollars versus $43.14 million dollars for a television station. *See: BIA State of the Industry Television Reports*, various years.

goals of viewpoint diversity and program diversity.[59] Past Commission efforts to regulate source diversity centered on broadcast television. The Prime Time Access Rule (PTAR) and the Financial Interest and Syndication (Fin-Syn) rules limited vertical integration between program producers and broadcast television networks.[60] The Commission eliminated those regulations when it could not justify them in light of media marketplace changes.[61]

43. The record before us does not support a conclusion that source diversity should be an objective of our broadcast ownership policies. The Center for Creative Community (CCC), the Coalition for Program Diversity (CPD), and the Writers' Guild of America (WGA) contend that source diversity is lacking on prime time broadcast television today, and therefore that the Commission should require the largest networks to purchase a portion of their prime time programming from unaffiliated program producers.[62] In support of its recommendation, CPD contends that in 1993, 68% of prime time programming on the three largest broadcast

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[59] *Notice*, 17 FCC Rcd at 18517-18 ¶ 37.

[60] PTAR forbade local stations carrying the programming of ABC, CBS, and NBC in the top 50 markets from offering more than three hours of prime time network programming Monday through Saturday. The Commission hoped that the hour vacated by the networks would encourage non-network production of quality prime time programming. The Fin-Syn rules prohibited the then-dominant television networks from obtaining a financial interest in independently-produced programming and from syndicating any program domestically. *Amendment of Part 73 of the Commission's Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting*, 23 F.C.C.2d 382 (1970).

[61] *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043(7th Cir. 1992) (remanding the Commission's decision to retain modified financial interest and syndication rules); *In re Review of the Syndication and Financial Interest Rules*, 10 FCC Rcd 12165 (1995) (eliminating the fin-syn rules).

[62] CPD Comments at 3; CCC Comments at 7; WGA comments at 3.

networks was independently produced versus 24% today.[63] This decrease in independently-produced prime time programming, CPD argues, establishes that source diversity is rapidly declining and its revitalization should be the principal goal of this rulemaking.[64]

44. When prime time television viewing was dominated by three broadcast networks, the Commission elected to require broadcast networks to purchase prime time programming from unaffiliated producers in order to encourage diversity on television. In light of dramatic changes in the television market, including the significant increase in the number of channels available to most households today, we find no basis in the record to conclude that government regulation is necessary to promote source diversity.

45. In 1979, the vast majority of households had six or fewer local television stations to choose from, three of which were typically affiliated with a broadcast network.[65] Today the average U.S. household receives seven broadcast television networks and an average of 102 channels per home.[66] Commenters recommending that the Commission adopt source diversity as a goal offer no evidence of the quantity of programming sources across the delivered video programming market (*i.e.* both broadcast and non-broadcast channels) and why that quantity is deficient. Given the explosion of programming channels now available in the vast majority of homes today, and in the absence of evidence to the contrary, we

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[63] CPD Comments at 4-5.

[64] CPD Comments at i.

[65] Michael L. Katz, *Old Rules and New Rivals: An Examination of Broadcast Television Regulation and Competition* at 38 (Sept. 1999).

[66] 2002 Video Competition Report: Opening Statement of David F. Poltrack, Executive Vice President, CBS Television, Before the Forum on Media Ownership Rules, Col. U. Law School, New York, NY (Jan. 16, 2003).

cannot conclude that source diversity should be a policy goal of our broadcast ownership rules .

5. Minority and Female Ownership Diversity

46. Encouraging minority and female ownership historically has been an important Commission objective,[67] and we reaffirm that goal here. In 1995, the Commission issued a Notice of Proposed Rulemaking to "explore ways to provide minorities and women with greater opportunities to enter the mass media industry."[68] Thereafter, in 1996, the Commission issued a

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[67] *See, e.g., Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 F.C.C.2d 979 (1978) (articulating policies to increase the level of broadcast facility ownership by minorities, including the comparative hearing minority preference, distress sale, and tax certificate policies); *see also Amendment of Section 73.3555 (formerly sections 73.35, 73.240 and 73.636) of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 F.C.C.2d 74, 97 (1985) *("1985 Multiple Ownership MO&O")* (enabling: (1) persons acquiring "cognizable interests" in minority owned and controlled broadcast stations to own 14 of each AM, FM, and television stations (instead of the standard numerical cap of 12 each); and (2) a television station owner to reach a maximum of 30% of the national audience (instead of the standard 25% cap) provided that at least 5% of the aggregate reach of its stations is contributed by minority controlled stations).

[68] *See Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*, 10 FCC Rcd 2788 (1995). In its subsequent 1998 Report and Order, the Commission amended FCC Form 323, Annual Ownership Report, to include race and gender data of parties with attributable interests in commercial broadcast licenses, thereby enabling the Commission to "determine accurately the current state of minority and female ownership of broadcast facilities, to determine the need for measures designed to promote ownership by minorities and women, to chart the success of any such measures that we may adopt, and to fulfill our statutory mandate under Section 257 of the 1996 Act and Section 309(j) of the Communications Act of 1934 to promote opportunities for small businesses and businesses owned by women and minorities in the broadcasting industry." *1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes; Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*, 13 FCC Rcd 23056, 23095 (1998). *See* 47 U.S.C. § 309(j)(3)(B) (requiring the Commission, in designing systems of competitive bidding for broadcast licenses, to

Notice of Inquiry seeking comments on the nature of market entry barriers for small businesses.[69] In addition, the Commission held public forums to identify barriers to competition and to formulate strategies to overcome them.[70]

"promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including . . . businesses owned by members of minority groups and women").

[69] *See Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, 11 FCC Rcd 6280 (1996); *see also Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, Report, 12 FCC Rcd 16802 (1997). The Commission, in a separate proceeding, tentatively concluded that it should take steps to further its "longstanding goal of increasing minority ownership of broadcast stations" and sought comment on what competitive bidding tools could be used to achieve this goal, and the goal of increased female ownership. *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses; Reexamination of the Policy Statement on Comparative Broadcast Hearings; Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 12 FCC Rcd 22363, 22399-401 (1997). In its First Report and Order following this NPRM, the Commission noted that it had commenced a series of studies to examine the market entry barriers encountered by minorities and women, and would wait for review of, and public comment on, these studies prior to determining competitive bidding rules affecting minorities and women. As an interim measure, the Commission adopted a "new entrant" bidding credit. *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses; Reexamination of the Policy Statement on Comparative Broadcast Hearings; Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 13 FCC Rcd 15920, 15994-95 (1998).

[70] *See Forum on Small Business Market Entry Barriers*, FCC Public Notice 64975 (rel. Sept. 5, 1996). In 2000, the Commission released five studies regarding the market entry barriers faced by minorities, women, and small businesses in the communications industry. *See FCC Chairman Kennard and Commissioner Tristani to Host Policy Forum on Market Entry Barriers Faced by Small, Women- and Minority-Owned Businesses on Tuesday, December 12, 2000*, 16 FCC Rcd 3772 (2000). We believe additional

47. We have received comments advocating various policies to enhance minority and female ownership of broadcast companies.[71] NABOB recommends that we should maintain our current ownership rules; use Arbitron markets to define radio markets; give greater consideration to the promotion of viewpoint diversity and minority ownership when we review assignment of license and transfer of control applications; eliminate our policy of granting temporary waivers of our multiple ownership rules (which allow merging broadcasters 6-24 months to come into compliance with the rules); adopt a bright-line test to limit radio ownership consolidation; and urge Congress to reinstate the minority tax certificate policy.[72]

48. IPI argues that maintenance of broadcast ownership caps will best serve the distinct programming preferences of minority groups.[73] AWRT asks us to include the goal of increasing the number of female-owned broadcast businesses as we consider changes to our broadcast ownership rules.[74] UCC urges the Commission to "explicitly advance through its ownership rules" the policy goal of promoting broadcast ownership opportunities for women, minorities and small businesses.[75]

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evidence is necessary, however, before we reach conclusions on these important issues. We note that MMTC asks that we include in this record and seek comment on these five studies. We take official notice of the 2000 market entry barrier studies, as they were publicly released and are available on our web site, so it is unnecessary to include them in the record.

[71] *See, e.g.*, MMTC/NABOB Motion for Further Extension of Time, filed Dec. 9, 2002 at 4-5 (asking the Commission to affirm that minority ownership is a central interest in ownership proceedings).

[72] NABOB Comments at 3-4, 17-25; NABOB Reply Comments at i-ii, 2-5, 9-11.

[73] IPI Comments at 58.

[74] AWRT Comments at 5-7.

[75] UCC Comments at 17-19. UCC also asks that we reject NAB's proposal for a more relaxed television duopoly rule waiver standard, arguing that more easily-obtained waivers would undermine opportunities for new market

49. MMTC proposes business and regulatory initiatives that "would go a long way toward increasing entry into the communications industry by minorities."[76] MMTC's initiatives include: (1) equity for specific and contemplated future acquisitions; (2) enhanced outreach and access to debt financing by major financial institutions; (3) investments in institutions specializing in minority and small business financing; (4) cash and in-kind assistance to programs that train future minority media owners; (5) creation of a business planning center that would work one-on-one with minority entrepreneurs as they develop business plans and strategies, seek financing, and pursue acquisitions; (6) executive loans, and engineers on loan, to minority owned companies and applicants; (7) enhanced access to broadcast transactions through sellers undertaking early solicitations of qualified minority new entrants and affording them the same opportunities to perform early due diligence as the sellers afford to established non-minority owned companies; (8) nondiscrimination provisions in advertising sales contracts; (9) incubation and mentoring of future minority owners; (10) enactment of tax deferral legislation designed to foster minority ownership; (11) examination of how to promote minority ownership as an integral part of all FCC general media rulemaking proceedings; and (12) ongoing longitudinal research on minority ownership trends, conducted by the FCC, NTIA, or both[77]; (13) sales to certain minority or small businesses as alternatives to divestitures.

50. These comments contain many creative proposals to advance minority and female ownership. Clearly, a more thorough exploration of these issues, which will allow us to craft specifically tailored rules that will withstand judicial

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entrants, including women and minorities. UCC Reply Comments at 23-25.

[76] MMTC Nov. 5, 2002 Comments at Tab 10, "Twelve Minority Ownership Solutions."

[77] *Id.*

scrutiny, is warranted.[78] Therefore, we will issue a Notice of Proposed Rulemaking to address these issues and incorporate comments on these issues received in this proceeding into that proceeding.

51. We see significant immediate merit in MMTC's proposal regarding the transfer of media properties that collectively exceed our radio ownership cap. MMTC recommends that the Commission generally forbid the wholesale transfer of media outlets that exceed our ownership rules except where the purchaser qualifies as a "socially and economically disadvantaged business (SDB)."[79] As discussed in the Grandfathering and Transition Procedures, Section VI(D) *infra*, we agree with MMTC that a limited exception to a "no transfer" policy for above-cap combinations would serve the public interest. We agree with MMTC that the benefits to competition and diversity of a limited exception allowing entities to sell above-cap combinations to eligible small entities, which we define below, outweigh the potential harms of allowing the above-cap combination to remain intact. Greater participation in communications markets by small businesses, including those owned by minorities and women, has the potential to strengthen competition and diversity in those markets. It will expand the pool of potential competitors in media markets and should bring new competitive strategies and approaches by broadcast station owners in ways that benefit consumers in those markets.

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[78] *See Adarand Constructors Inc. v. Pena*, 515 U.S. 200, 227 (1995) (holding that all racial classifications imposed by a governmental agency must be analyzed by reviewing courts under strict scrutiny, and are constitutional "only if they are narrowly tailored measures that further compelling governmental interests").

[79] MMTC Comments at 107. *See also* NAB Reply Comments at 44 ("Although NAB would go further, so that station owners would be allowed to transfer properly formed station combinations freely to any purchaser, whether an SDB or not, NAB does not oppose MMTC's proposal.").

52. In addition, MMTC proposes that we adopt an "equal transactional opportunity" rule similar in some respects to our EEO requirements.[80] While such a rule is worthy of further exploration, we decline to adopt a rule without further consideration of its efficacy as well as any direct or inadvertent effects on the value and alienability of broadcast licenses. We see merit in encouraging transparency in dealmaking and transaction brokerage, consistent with business realities. We also reiterate that discriminatory actions in this, and any other context, is contrary to the public interest. For these reasons, we intend to refer the question of how best to ensure that interested buyers are aware of broadcast properties for sale to the Advisory Committee on Diversity for further inquiry and will carefully review any recommendations this Committee may proffer. As soon as the Commission receives authorization to form this committee we will ask it to make consideration of this issue among its top priorities.[81]

B. Competition

53. In this section, we define our objectives with respect to media competition and we address arguments that we should not pursue competition as a public interest objective and instead defer all competition concerns to the antitrust authorities, *i.e.*, the Department of Justice or the Federal Trade Commission.[82]

54. Since the beginning of the federal government's regulation of broadcast spectrum, it has been a basic tenet of the communications policy that "there be competition in the

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[80] MMTC Comments at 115-120.

[81] We anticipate that the Committee will make recommendations on ways to improve our regulatory programs designed to enhance new entry into broadcasting.

[82] Fox Comments at 57-59; NAB Comments in MM Docket No. 01-317 at 28-30; Viacom Comments at 53, 67-69; WVRC Comments in MM Docket No. 00-244 at 18; Cox Comments in Docket No. 00-244 at 15-16; Entercom Comments in Docket No. 00-244 at 3.

radio broadcasting industry."[83] For that reason, the Communications Act prohibits us from "grant[ing] a monopoly in the field of broadcasting,"[84] and we are directed instead to serve the "public interest" by "assur[ing] fair opportunity for open competition in the use of broadcasting facilities."[85] From its inception, the Commission has adhered closely to that mandate and sought to ensure that transfers and assignments of station licenses remain consistent with the policy of free competition embodied in the Communications Act.[86]

55. The 1996 Act reinforces the link between competitive markets and the public interest. One of the central aims of the 1996 Act was to introduce competition to communications industries that traditionally have been thought of as "natural monopolies."[87] As the preamble to the 1996 Act makes manifest, Congress believed that greater competition and reduced regulation would "secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[88] Thus, the 1996 Act embodies a philosophy – new to telecommunications, but well-established in broadcasting – that competition is the most

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[83] *Mansfield Journal Co. v. FCC*, 180 F.2d 28, 33 (1950).

[84] *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474-76 (1940).

[85] *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203 (1956); *see also FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940) ("Congress moved under the spur of a widespread fear that in absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field.").

[86] *See Genesee Radio Corp.*, 5 F.C.C. 183, 186-87 (1938).

[87] *See Sanders Bros.*, 309 U.S. at 474-75.

[88] 1996 Act Preamble, 110 Stat. 56; *see also* Joint Explanatory Statement at 113 (1996 Act "provide[s] for a procompetitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition").

effective means of producing the marketplace results that best serve the public interest.

56. We thus see nothing in the 1996 Act that signifies a retreat from our deep and abiding interest in promoting and preserving competition in broadcasting. Indeed, by directing us to determine whether our ownership rules are "necessary in the public interest *as a result of competition*," we believe Congress charged us to implement policies that create opportunities for greater competition – both among broadcasters and between broadcasters and other outlets – that would lessen the need for prescriptive ownership regulations. Regardless of whether we conclude in a particular context that maintaining, modifying, or repealing one of our ownership rules best advances our interest in competition, it is clear that competition is a policy that is intimately tied to our public interest responsibilities and one that we have a statutory obligation to pursue. As recently as last year, the Court of Appeals for the District of Columbia reaffirmed this point when it stated: "[t]o the extent Sinclair maintains that consideration of competition is beyond the proper purview of the Commission, it is simply wrong."[89]

57. We hereby affirm our longstanding commitment to promoting competition by ensuring pro-competitive market structures. Consumers receive more choice, lower prices, and more innovative services in competitive markets than they do in markets where one or more firms exercises market power.[90] These benefits of competition can be achieved when regulators accurately identify market structures that will permit vigorous competition.

58. In limiting broadcast ownership to promote economic competition, we also take major strides toward protecting and

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[89] *Sinclair*, 284 F.3d 148 (citing *NCCB*, 436 U.S. at 795).

[90] See F.M. Scherer and David Ross, INDUS. MKT STRUCTURE AND ECON. PERFORMANCE (3rd Ed.) at 19-28 (Houghton Mifflin Co., Boston MA, 1990).

promoting our separate policy goal of protecting competition in the marketplace of ideas -- viewpoint diversity. This is because antitrust theory has at its core an objective that is similar to this agency's goal of promoting viewpoint diversity: both public policy objectives share a common belief that the aggregation of inordinate market share by a small number of firms will tend to harm public welfare; both are built on the notion that highly concentrated markets tilt the proper balance of power too far in favor of some firms and against those who would challenge them.[91]

59. In this proceeding, Fox argues that because economic markets are narrower than idea markets, we should eliminate our broadcast ownership rules. Fox contends that antitrust enforcement will prevent mergers on economic competition grounds before markets would become unreasonably concentrated on diversity grounds.[92] Although our own analysis of the record does not support Fox's view in all cases, we take this opportunity to underscore that in many markets, the record evidence does show that our competition-based ownership limits (*i.e.* the caps on local radio and local television ownership) more than adequately protect viewpoint diversity in a large number of markets despite being based on standard antitrust principles. For example, as explained below, we adopt rules allowing television combinations subject to the proviso that one company may not combine two of the top four-rated stations in a local market.[93] This rule is grounded in economic competition analysis, but it also has the effect of separating ownership of those local television stations most

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[91] Because of this common theoretical underpinning between competition policy and viewpoint diversity policy, some have advocated in favor of expanding antitrust regulation to include protecting competition in the marketplace of ideas. *See* Maurice E. Stucke and Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L. J. 249 (2001).

[92] Fox Comments at 26-29.

[93] *See* Local TV Ownership Rule, Section VI(A), *infra*.

likely to be significant contributors to local viewpoint diversity through the production of local news and public affairs programming. Nonetheless, contrary to Fox's contention, our analysis of the record leads us to conclude that preserving competitive markets will not, in all cases, adequately protect viewpoint diversity. As discussed in the Cross-Media Limits section below, we find that certain combinations in smaller markets would unreasonably threaten viewpoint diversity even if they would not, under standard antitrust theory, result in competitive harms.

60. *Measurement of competition.* Historically we have relied on assessments of competition in advertising markets as a proxy for consumer welfare in media markets.[94] We found that competition among broadcast outlets was likely to benefit consumers by making available programming that meets the programming preferences of consumers. In our 2001 decision modifying the dual network rule, however, we suggested that the changing nature of electronic media markets – particularly the direct payment by a majority of consumers for delivered video programming – might cause us to revisit our traditional focus on advertising markets as the appropriate means of measuring competition in connection with our broadcast ownership limits.[95]

61. Although advertising markets continue to be a reasonable basis on which to evaluate competition among

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[94] *Amendment to § 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM, and TV Broadcast Stations*, 100 F.C.C.2d 17 (1984) ("*1984 Multiple Ownership Report and Order*"); *Revision of Radio Rules and Policies*, 7 FCC Rcd 6387 (1992) ("*1992 Radio Ownership Order*"); *Review of the Commission's Regulations Governing TV Broadcasting, TV Satellite Stations Review of Policy & Rules*, 14 FCC Rcd 12903 (1999) ("Local TV Ownership Report and Order"); *clarified in Memorandum Opinion & Second Order on Reconsideration*, 16 FCC Rcd 1067 (2001)("Local TV Ownership Recon Order").

[95] *Amendment of Section 73.658(g) of the Commission's Rules – The Dual Network Rule*, 16 FCC Rcd 11114 (2001).

media companies, in this *Order* we will rely more heavily on other metrics. We do so because changing business models affect the nature of competition in the relevant economic markets. In the past, television stations generally faced economic competition from other television stations, and radio stations from other radio stations. The television and radio markets relied principally on advertising revenues to fund their businesses. Today, the financial models for the television and radio businesses are changing. A large portion of the revenue in the television business now consists of direct payments by consumers. Eighty-five percent of American households subscribe to television programming supplied by multichannel video programming service from delivery systems (MVPDs) – cable television and direct broadcast satellite -- to watch television.[96] MVPDs, in turn, typically pay non-broadcast programming networks, such as ESPN, CNN, and MTV, for the right to deliver those channels to subscribers. The payments received by program networks represent one source of their revenue. Non-broadcast programming networks also however, sell advertising time on their channels. Thus, in competing with broadcasters, non-broadcast programming networks typically have two income streams to develop or purchase programming. Broadcasters continue to rely overwhelmingly on advertising revenue.[97]

62. We also find that the subscription model of cable television and DBS offer an additional competitive advantage over advertising-only broadcast television stations. Broadcast

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[96] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 17 FCC Rcd 26901, 26975 (2002) ("*2002 Video Competition Report*").

[97] For example, the cable industry received $15.5 billion in advertising revenues and $35.5 billion in subscriber payments for video programming in 2001. By contrast, the broadcast television industry received $38.9 billion in advertising revenue. (Universal McCann, U.S. Advertising Vol. (March 2003)) Kagan World Media, *Broadband Cable Financial Databook 2002* (2002) at 10-11.

stations are limited in their ability to maximize consumer welfare because broadcast programming is a public good.[98] Local television stations have thus far been unable to capture and profit from viewers' relative intensity of preference for certain programming. That is, the advertising-based business model for broadcast stations does not differentiate between programming that viewers value highly and programming that is viewed, but valued less.[99] As long as viewers are watching a broadcast show, they are "sold" to advertisers at a particular rate irrespective of the intensity of their preference for that show.

63. The business model of cable television and DBS, by contrast, permits non-broadcast channels to extract direct payments from viewers based partly on viewers' strength of preference for different programming. MVPDs accomplish this by tiering groups of specialized video channels and by selling certain other highly valued channels on a channel-by-channel basis. The vast majority of MVPD viewers purchase the "basic" tier of MVPD service that includes both general interest channels and special interest channels. MVPDs also offer highly desired, niche-oriented, channels as part of separate tiers and certain others as stand-alone premium channels. Viewers that highly value either purchase them as part of a tier of channels or on a stand-alone basis. This ability of non-broadcast channels to charge viewers for their programming, along with selling advertising on that programming, allows certain non-broadcast channels to segment the viewing market through tiered or premium

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[98] A public good is a good whose consumption does not preclude consumption of the same good by other consumers. Andrew Mas-Colell, Michel D. Whinston, and Jerry R. Green, MICROECONOMIC THEORY (Oxford Univ. Press 1995) at 359-64.

[99] For a discussion of the effects of the public good nature of broadcast television and the issues faced by broadcasters and regulators, see Thomas G. Krattenmaker and Lucas A. Powe, Jr., REGULATING B'CAST PROGRAMMING (MIT Press and AEI Press, 1995) at 40-43.

offerings, thereby capturing and profiting from viewers' intensity of preference in a way that broadcast stations, through an advertising-based business model, cannot.

64. We agree with broadcasters who contend that the MVPD business model, with two revenue streams, has become a competitive dynamic for which our competitive analysis should account.[100] Therefore, in analyzing markets comprised of both free over-the-air broadcasters as well as subscription delivery systems, we will look to audience share as one metric for assessing the state of competition, which we find to be a more accurate gauge of competition in these circumstances. We will not discard advertising market analysis where appropriate, but we limit its reliance to discrete markets where we believe the foregoing analysis is inapplicable. This includes our analysis of the dual network rule and the national television ownership cap and in determining whether different media platforms should be regarded as economic substitutes. For those purposes, we will continue to look to advertising market shares as one consideration, where that is an appropriate gauge of competition, in determining whether opportunities for media properties to earn revenue may be put at risk absent some structural regulation.

65. To the extent we rely on other competitive metrics, we note that the antitrust authorities generally focus their inquiry on price competition, and their primary concern is in ensuring economic efficiency through the operation of a competitive market structure. Although related, the Commission's public interest inquiry has a different focus. As our predecessor, the Federal Radio Commission put it, "[t]he emphasis must be first and foremost on the interest, the convenience, and the necessity of the . . . public, and not on the interest, convenience, or

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[100] Victor B. Miller, Christopher H. Ensley, Tracy B. Young, *Television Industry Summit 2002: Leveling the Playing Field. The Case for Deregulation*, Bear Stearns (Jan. 2003) at 51-64, 168-69, 184.

necessity of the individual broadcaster, or the advertiser."[101] Thus, in evaluating our interest in preserving competitive broadcast markets, we will consider the ultimate effect that a diminution in competition would have on the consuming public.

66. There is no serious dispute that, if consumers uniformly paid a subscription fee to all television and radio stations to access programming, we would have an interest in ensuring competition in broadcasting.[102] One reason for our interest is that competition works to constrain prices to efficient levels, making access to programming services more affordable and therefore more available to a greater number of Americans.[103] Here, of course, radio and television programming is a public good, supported by advertising revenues and available without charge to everyone with the proper equipment. But it does not follow from the public good nature of broadcast television and radio that our competition concerns are any less important in this area.

67. Although lower prices are an important benefit of competitive markets, we have repeatedly emphasized that competition also is the wellspring of greater innovation and improvements in the quality of service.[104] Thus, although the public does not pay a subscription fee to receive over-the-air broadcast signals, we continue to have a public interest responsibility, distinct from our diversity and localism goals, to ensure that broadcasting markets remain competitive so that all the benefits of competition – including more innovation and improved service – are made available to the public.

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[101] Fed. Radio Comm'n, Second Ann. Rpt. 169-70 (1928) (quoting in *Pottsville Broadcasting*, 309 U.S. at 138 n.2).

[102] *See, e.g., Application of EchoStar Communications Corp., General Motors Corp., and Hughes Electronics Corp.* (Hearing Designation Order), 17 FCC Rcd 20559, 20603 (2002) ("*EchoStar/DirecTV HDO*").

[103] *See, e.g.*, id. at 20603 ¶ 97. *See also* 47 U.S.C. § 151.

[104] *See, e.g.*, id. at 20559 ¶ 176.

68. Therefore, we conclude that our duty as an agency runs to consumers, not advertisers. In many cases, competitive market structures specifically designed to protect consumers also will protect advertisers, and vice versa. Nonetheless, in setting our local television and local radio ownership caps, we will rely, where possible, on measures other than shares of advertising markets in order to reflect the decreasing relevance of advertising market shares as a barometer of competition.

69. *Innovation.* In the *Notice* we sought comment on whether innovation should be an objective of our broadcast ownership policies.[105] The Information Policy Institute (IPI) contends that we should consider the effects of different market structures on innovation incentives.[106] IPI states that innovation theory premised on the need for scale does not automatically justify relaxed broadcast ownership limits because large firms are most likely to innovate only if they face sufficient competitive pressure. With respect to media markets generally, IPI argues that relaxed ownership regulations are unlikely to increase innovation in media markets because, according to IPI, the affected industries are mature.[107] NAB/NASA also implies that innovation is a relevant policy objective in its arguments that the existing national television cap preserves independently-owned groups of affiliates that a proven record of programming and technological innovation.[108]

70. We agree with IPI and NAB/NASA that innovation should be a policy objective of our broadcast ownership regulations. Consumers benefit from competitive markets in multiple ways, including lower prices, greater choice of sellers, and innovative products and services. Where a market such as broadcasting is characterized by a significant degree of non-

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[105] *Notice*, 17 FCC Rcd at 18525-26 ¶ 68.

[106] IPI Comments at 50.

[107] *Id.* at 52.

[108] NAB/NASA Reply Comments at 23-27.

price competition, it may be particularly important for us to focus on how our ownership rules affect innovation incentives. Innovation may be less measurable in the short term than other attributes of media market, such as price, total output, and number of firms in the market, but over longer periods of time, may represent a critical driver of consumer welfare.

71. The transition from analog to digital services by broadcasters represents a potentially significant enhancement to consumer welfare. Digital transmission of video and audio programming by television and radio stations may facilitate new services for consumers by permitting more efficient bandwidth utilization. With respect to local televisions stations, this additional bandwidth could be used to transmit high-definition programming; to transmit one or more additional program streams; or to deliver entirely new services.[109] NAB/NASA has argued that local television ownership structures are very likely to affect stations' ability to proceed with the ongoing digital transition. NAB contends that the fixed costs associated with digital television equipment upgrades fall disproportionately on stations in smaller markets and that station combinations will speed the transition.[110] In addition, the introduction of digital transmission by radio stations may permit greater competition and innovation in radio markets by facilitating improved signal quality and by permitting stations to deliver data along with audio to users' receivers.

72. In sum, we conclude that the Commission should seek to promote innovation through its broadcast ownership limits. Consumer welfare is likely to be enhanced when, all else being equal, the Commission permits broadcast market structures that encourage innovation. We agree with IPI, however, that

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[109] *See, e.g.*, NAB/NASA Comments at 26-27 (23 companies owning television stations formed iBlast to "explore, research, and develop new business relationships and new uses for the digital spectrum").

[110] NAB Comments at 71-72.

multiple factors influence the pace of innovation, only one of which is market structure.[111] We will therefore make ownership decisions that promote innovation in media markets based principally on evidence that particular market structures or firm characteristics tend to encourage innovation.

C. Localism

73. In the *Notice*, we sought comment on the extent to which localism should continue to be a policy goal in our regulation of broadcast ownership. We agree with NAB/NASA that localism continues to be an important policy objective. Localism is rooted in Congressional directives to this Commission and has been affirmed as a valid regulatory objective many times by the courts. We hereby reaffirm our commitment to promoting localism in the broadcast media.

74. Federal regulation of broadcasting has historically placed significant emphasis on ensuring that local television and radio stations are responsive to the needs and interests of their local communities. In the Communications Act of 1934, Congress directed the Commission to "make such distribution of licenses, frequencies, hours of operation, and power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."[112] In the earliest government regulation of radio, the Commission embraced localism. In the Federal Radio Commission's 1927 Report to Congress, it wrote: "The Commission found it possible to reassign the allocated stations to frequencies which would serve as many communities as possible to ensure those communities had at least one station that would serve as a basis for the development of good broadcasting to all sections of the country.... New York and

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[111] IPI Comments at 48 ("[T]he relationship of market structure, R&D spending, and technological progress . . . involves a myriad of ill-understood and understudied complex interactions.").

[112] 47 U.S.C. § 307(b).

Chicago stations were not allowed to dominate the situation."[113]

75. When the Commission created the Table of Allotments in 1952 pursuant to the Communications Act, localism was the organizing principle of the plan. In announcing the allotments, the Commission explained that dispersed allotments "protect[] the interests of the public residing in smaller cities and rural areas more adequately than any other system."[114] In the legislative history of the 1996 Act, Congress strongly reaffirmed the importance of localism: "Localism is an expensive value. We believe it is a vitally important value, however [and] should be preserved and enhanced as we reform our laws for the next century."[115]

76. The courts too have long viewed localism as an important public interest objective of broadcast regulation. In *NBC v. United States*, the Supreme Court wrote: "Local program service is a vital part of community life. A station should be ready, able, and willing to serve the needs of the local community."[116] Last year the D.C. Circuit affirmed the legitimacy of Commission regulation to preserve localism, stating: "[T]he public interest has historically embraced diversity (as well as localism) . . . and nothing in § 202(h) signals a departure from that historic scope."[117]

77. *Measurement of localism.* We remain firmly committed to the policy of promoting localism among broadcast outlets. Today we seek to promote localism to the greatest extent possible through market structures that take advantage of media

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[113] SECOND ANNUAL REPORT OF THE FEDERAL RADIO COMMISSION TO THE CONGRESS OF THE UNITED STATES FOR THE YEAR ENDED JUNE 30 (1928) at 8-9.

[114] *Sixth Report and Order*, 17 Fed. Reg. 3905 (1952).

[115] H. Rep. No. 104-104 (1996) at 221.

[116] *NBC v. United States*, 319 U.S. 190, 203 (1943).

[117] *Fox Television*, 280 F.3d at 1042.

companies' incentives to serve local communities. In addition, we seek to identify characteristics of those broadcasters that have demonstrated effective service to individual local communities and to encourage their entry into markets currently prohibited by our existing rules.

78. To measure localism in broadcasting markets, we will rely on two measures: the selection of programming responsive to local needs and interests, and local news quantity and quality. The Commission decided long ago that local station licensees have a responsibility to air programming that is suited to the tastes and needs of their community and that the station licensee, not a network or any other party, must decide what programming will best serve those needs.[118] Program selection, then, is a means by which local stations respond to local community interests, and we will use it as one measure of localism.

79. A second measure of localism is the quantity and quality of local news and public affairs programming. Commenters have argued that news and public affairs goes to the core of the Commission's policy objectives.[119] We agree that the airing of local news and public affairs programming by local television stations can serve as a useful measure of a station's effectiveness in serving the needs of its community. Our decision to consider local news attributes in our decisions is consistent with our 1984 evaluation of the national television cap. In that decision we analyzed record evidence regarding the amount and quality of local news produced by owners of different-sized television station groups.[120] As discussed below, this measure of service to local markets is relevant to

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[118] *See Deregulation of Radio*, 84 F.C.C.2d 968, 981 (citing *En Banc Programming Inquiry Statement*, 44 F.C.C. 2303, 2314 (1960)).

[119] CFA Comments at 29 ("The primary purpose of ownership rules should be to ensure a diverse, antagonistic marketplace for news and information – not entertainment.").

[120] *1984 Multiple Ownership Report and Order*, 100 F.C.C.2d at 37-38.

our consideration of both the national television cap and our local broadcast rules.

D. Regulatory Certainty

80. After defining our policy goals of diversity, competition and localism, we must determine the particular regulatory framework that would best achieve these goals. In the *Notice* and in the *Local Radio Ownership NPRM* we sought comment on whether to adopt a pure case-by-case analysis or bright line rules.[121] Based on the record and our own experience administering structural ownership rules, we conclude that the adoption of bright line rules, on balance, continues to play a valuable role in implementing the Commission's goals. We have also decided to retain our existing framework of targeted, outlet-specific, multiple ownership rules, that cover the various media and perceived areas of potential competition and diversity concerns rather than adopting a single rule to cover all media.[122]

81. The Commission is required to examine any proposed transfer of a broadcast license and must affirmatively find that the transfer is in the public interest. In the context of broadcast transactions, the Commission's analysis is simplified by the extensive body of structural rules we adopt herein. Thus, the extensive rulemaking proceeding used to develop these broadcast ownership rules takes full account of the Commission's public policy goals of diversity, competition, and localism. These rules squarely embody the Commission's

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[121] *Notice*, 17 FCC Rcd at 18538-39 ¶¶ 106-111; *Local Radio Ownership NPRM*, 16 FCC Rcd at 19886-87 ¶¶ 57-60.

[122] In the *Notice*, we asked whether we should adopt a single rule, instead of outlet-specific rules, in order to assure consistency. We also asked whether such a rule could be focused on promoting viewpoint diversity and whether it might apply to cable systems. 17 FCC Rcd at 18538-39. CWA proposes that if we relax our local TV ownership rules, we should adopt a single, unified rule to cover all local media markets. CWA Comments at 46-48. Our new Cross Media Limits are targeted to viewpoint diversity, but, as discussed below, it does not encompass cable systems.

public interest goals of limiting the effect of market power and promoting localism and viewpoint diversity.

82. As we stated in the *Notice*, bright line rules and case-by-case analysis both offer different advantages and disadvantages associated with predictability of outcome, administrative costs, flexibility in administering our rules, and application processing time. Many parties favor bright line rules and oppose case-by case analysis because bright line rules provide certainty to outcomes, conserve resources, reduce administrative delays, lower transaction costs, increase transparency of our process, and ensure consistency in decisions.[123] We believe that these factors weigh in favor of the bright line rule approach. Commenters who support adopting case-by-case instead of structural rules in the context of the local television ownership rule and radio/television ownership rule, argue that blind adherence to structural limits would not adequately reflect the true nature of a market, and that competition in local markets would be sufficiently safeguarded by case-by-case analysis.[124] As discussed below, we have taken into consideration the nature of markets and our responsibility to ensuring a competitive marketplace in designing the structural rules.

83. Other commenters oppose case-by-case analysis, particularly in the context of radio transactions. These commenters argue that the current case-by-case approach adopted in the interim policy has brought more uncertainty, administrative delays, greater transaction costs to the application process, and has invited abuse by competitors.[125]

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[123] NAB Comments at 48-49; Bonneville Comments at 8; NAB Comments in MM Docket No. 01-317 at 47, 48-49; Eure Comments in MM Docket No. 01-317 at 5; HBC Comments in MM Docket No. 01-317 at 13; MMTC Comments in MM Docket No. 01-317 at 49.

[124] Buckley Comments at 1, 5; Paxson Comments at 29-30, Pappas Comments at 14-15.

[125] NAB Comments in MM Docket No. 01-317 at 47; NABC Comments in

Moreover, UCC claims that the current approach has failed to protect against unreasonable consolidation in the radio industry.[126] A case-by-case approach also makes business planning difficult on the industry side and is resource-intensive for the Commission, raising regulatory costs. We agree with the majority of commenters that favor bright line rules. The bright line rules we establish in this *Order* will protect diversity, competition, and localism while providing greater regulatory certainty for the affected companies than would a case-by-case review. Any benefit to precision of a case-by-case review is outweighed, in our view, by the harm caused by a lack of regulatory certainty to the affected firms and to the capital markets that fund the growth and innovation in the media industry. Companies seeking to enter or exit the media market or seeking to grow larger or smaller will all benefit from clear rules in making business plans and investment decisions. Clear structural rules permit planning of financial transactions, ease application processing, and minimize regulatory costs.[127]

84. We recognize that bright line rules preclude a certain amount of flexibility. A case-by-case analysis would allow the Commission to reach decisions by taking into account particular circumstances of every case. For instance, bright line rules may be over-inclusive, by preventing transactions that would result in increased efficiencies, or under-inclusive, by

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MM Docket No. 01-317 at 17; UCC Comments in MM Docket No. 01-317 at 24; Clear Channel Comments in MM Docket No. 01-317 at 25, n.81; Cumulus Comments in MM Docket No. 01-317 at 23; Idaho Wireless Comments in MM Docket No. 01-317 at 7; Mapleton Comments in MM Docket No. 01-317 at 7; MBC Comments in MM Docket No. 01-317 at 10.

[126] UCC Comments in MM Docket No. 01-317 at 20.

[127] *Cf. Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry; Reexamination of the Commission's Cross-Interest Policy*, 14 FCC Rcd 12559, 12581-82 ¶¶ 43-44 (1999) ("*1999 Attribution Report and Order*") *on. recon.*, 16 FCC Rcd 1097 (2001).

allowing transactions that would raise concerns, if the circumstances of the case were reviewed. However, our experience with the current case-by-case analysis used for radio transactions leads us to believe that this approach in the area of media ownership is fraught with administrative problems. Currently, any radio transaction that proposes a radio station combination that would provide one station group with a 50% share of the advertising revenue in the local radio market, or the two station groups with a 70% advertising revenue, undergoes additional public interest analysis. For each of these transactions, the staff conducts an individual competitive analysis and may request additional information from the parties if it is necessary in order to reach a decision on a particular transaction. The administrative time and resources required for such an undertaking are considerable. Moreover, such an approach hinders business planning and industry investment for all radio firms falling within the ambit of our case-by-case review. We are not persuaded that this approach is necessary in order to administer our ownership rules effectively. Indeed, we eliminated the cross-interest policy in 1999, having held that the regulatory costs and chilling effects of that case-by-case approach to broadcast transactions, overlaid on top of our structural rules, and the benefits of applying a clear and discernable standard outweighed any risks of potential abuses in eliminating the policy.[128]

85. The bright line rules adopted today have been developed based upon our review of the media marketplace and our assessment of what ownership limits are necessary in order to promote our goals in applying ownership rules. We are confident that the modified rules will reduce the chances of precluding transactions that are in the public interest or, alternatively, permitting transactions that are not in the public interest.[129] In addition, we have discretion to review particular

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[128] *Id.* at 12609-12611 ¶¶ 112-16.

[129] Our decision is not inconsistent with our decision to modify the CMRS

cases, and we are obligated to give a hard look both to waiver requests,[130] where a bright line ownership limit would proscribe a particular transaction, as well as petitions to deny.[131]

IV. MODERN MEDIA MARKETPLACE

A. Introduction – The Evolution of Media

86. Today's media marketplace is characterized by abundance. The public is better informed, better connected, and better entertained than they were just a decade ago. Traditional modes of media (e.g., newspapers, television, radio) have greatly evolved since the Commission first adopted media ownership rules in 1941,132 and new modes of media have

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Spectrum Cap rule. *See 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services*, 16 FCC Rcd 22668 (2001). There, the Commission moved from prophylactic spectrum limits to a case-by-case approach, finding that in light of the growth of both competition and consumer demand in the CMRS market, spectrum caps were no longer necessary. *Id.* at 22693. There, we determined that structural rules were no longer necessary because of the competitive nature of the marketplace, and that the current spectrum caps were interfering with the marketplace's creation of incentives regarding choice of technology. Our basis for choosing to move to a case-by-case analysis in that context, simply does not apply in the context of broadcast rules.

[130] *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (setting out criteria for waivers of Commission rules); *See also* 47 C.F.R. § 1.3.

[131] *See* 47 U.S.C.§ 309(d). A petition must contain specific allegations of fact sufficient to show that (1) the petitioner is a party in interest, (2) a grant of the application would be prima facie inconsistent with the public interest, and (3) a substantial and material question is presented to be determined by the Commission. *Sanders Bros*, 309 U.S. at 477; *Maumee Valley Broadcasting, Inc.*, 12 FCC Rcd 3487, 3488-89 (1997), *as modified by, CHET-5 Broadcasting, L.P.*, 14 FCC Rcd 13041 (1999); *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394-95 (D.C. Cir. 1985); *Mobile Communications Corp. of America v. FCC*, 77 F.3d 1399, 1409-10 (D.C. Cir. 1996).

[132] In 1941, based on the findings of the Chain Broadcasting Report, the Commission promulgated the first of its broadcast ownership rules restricting the development and commercial business practices of the broadcast radio networks. The Chain Broadcasting Report found that the radio networks had behaved in a manner that was contrary to the competition

transformed the landscape, providing more choice, greater flexibility, and more control than at any other time in history. Today we can access news, information, and entertainment in many enhanced and non-traditional ways via: cable and satellite television, digital transmission, personal and portable recording and playback devices, handheld wireless devices, and perhaps the most extraordinary communications development, the Internet. In short, the number of outlets for national and local news, information, and entertainment is large and growing.133

87. Such abundance in the media was not always available, however. The modern media marketplace is dramatically different from the media world of sixty years ago.134 In fact, the modern media marketplace is far different than just a decade ago. Ten years ago the world wide web was still nascent and was used primarily by technology enthusiasts. "Digital" was a term largely used to describe the abstract world of zeros and ones; DVD players had not yet hit the commercial market; and satellite television was available only via analog C-Band dishes that were almost eight feet in diameter. Cable television was also an analog transmission, resulting in 87% of cable systems offering fewer than 53 channels.135 Video programming was available 24-hours a day, seven days a week, but there were far fewer choices for news and entertainment than there are today.136

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and diversity goals defined by the Federal Radio Commission. *Report on Chain Broadcasting, Commission Order No. 37*, Docket No. 5060 (May 1941).

133 *See e.g.*, NAB Comments at 10; *see* Appendix B.

134 Fox Comments at i.

135 *Implementation of Section 19 of the 1992 Cable Act (Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming)*, 9 FCC Rcd 7442, 7567 (1994) ("*1994 Video Competition Report*") (23% of cable systems offered fewer than 30 channels of programming).

136 Today, there are more than 308 non-broadcast networks available for

88. This digital migration is having an effect on today's youth in a way that television had on the "baby boom" generation of the early fifties, and radio had on the youth of the Depression. Today's high school seniors are the first generation of Americans to have grown up with this extraordinary level of abundance in today's media marketplace. At home and at school, the majority of teens have access to cable television and high speed Internet access.137 At home, many teens have access to as many as 100 to 200 channels of video programming.138 The current generation of teens has always lived with 24-hour national and regional news networks, local television stations, and cable news channels,139 and thus have come to expect immediate and continuous access to news, information, and entertainment. Their world has never been different.

89. Section 202(h) requires the Commission to consider whether any of its broadcast ownership rules are "necessary in the public interest as a *result of competition*." This *Order*

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carriage by cable systems, whereas in 1993, there were only 106 non-broadcast programming services available for carriage. *See 2002 Video Competition Report*, 17 FCC Rcd at 26907; *1994 Video Competition Report*, 9 FCC Rcd at 7522, 7589-92.

[137] Approximately 81,000 public and private schools are served by cable in the classroom, reaching 78% of K-12 students. In 2001, approximately 99% of public schools had Internet access, and about 85% of public schools had high-speed Internet access. Cable in the Classroom, *Overview*, at http://www.ciconline.com/PressRoom/PressKit/ TheOrganization/overview (visited May 5, 2003); National Center for Education Statistics, *Internet Access in U.S. Public Schools and Classrooms: 1994-2001*, at http://nces.ed.gov/pubs2002/internet/3.asp (visited May 5, 2003).

[138] DBS provides as many as 200 channels of video programming. Many cable systems also currently offer a digital tier of service which, in many cases, provides subscribers with a total of more than 100 channels of video programming. OPP Working Paper No. 37, Broadcast Television: Survivor in a Sea of Competition by Jonathan Levy, Marcelino Ford-Livene, and Anne Levine (Sept. 2002) at 43, 48, 54 ("OPP Working Paper No. 37").

[139] CST Comments at 4.

confronts that challenge by determining the appropriate regulatory framework for broadcast ownership in a world characterized not by information scarcity, but by media abundance. This section tracks the history of the modern media marketplace to illustrate the rapid evolution of media outlets over the past sixty years.

B. History of the Modern Media Marketplace

1. The Age of Radio

90. At the time commercial broadcast radio was introduced during the early 1920s, newspapers were the primary source of news and information, with circulation reaching nearly 28 million readers.140 The advent of commercial broadcast radio offered the public a far more accessible and immediate mode of receiving information and entertainment than print. It also gave the public additional choices and additional viewpoints.141 Initially, the entertainment community was fearful of competition from this new medium, but they soon embraced radio for the new opportunities it offered.142

91. On November 2, 1920, KDKA, the first licensed commercial radio station, reported the results of the Harding-Cox presidential race.[143] This broadcast marked a significant

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[140] *Historical Statistics of the United States: Colonial Times to 1957, A Statistical Abstract* Supplement, US Department of Commerce, Bureau of the Census at R 169-72.

[141] Alfred D. Chandler, Jr. and James W. Cortada, Eds., A NATION TRANSFORMED BY INFORMATION: HOW INFORMATION HAS SHAPED THE US FROM COLONIAL TIMES TO THE PRESENT (Oxford University Press, New York, NY, 2000) at 149.

[142] Vaudeville theatre owners and booking agents discouraged their acts from performing over radio, fearing competition from the new medium. Similarly, the musical community feared that frequent airplay of songs would render the songs valueless in the sales market. Phyllis Stark, *A History of Radio Broadcasting*, BILLBOARD (Nov. 1, 1994) at http://www.kcmetro.cc.mo.us/pennvalley/biology/lewis/Crosby/billboard.htm (visited Jan. 27, 2003).

[143] Reed Bunzel, B'CASTING (Dec. 9, 1991, Supp.) at 27; *People and*

turning point in the timely dissemination of news; people with radio could hear the results of the election before they could read about it in the newspapers.

92. Although the initial audience for commercial radio was small, there continued to be significant advances in the early years. [144] On August 5, 1921, a major league baseball game was broadcast, providing the first sports broadcast for a mass audience.[145] A year later, Warren G. Harding became the first President to have his voice broadcast by radio.[146] Also that year, the first radio advertisement was aired in New York City.[147] Originally, radio broadcasts were operated by those wishing to promote their own businesses and by radio manufacturers as a means to promote and sell radios themselves. As relevant content grew, so did acceptance of radio by the public and by advertisers, eventually leading to advertising-financed operations.[148] By 1926, just six years after the first official commercial broadcasts, there were 528 stations

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Discoveries: KDKA Begins to Broadcast, WGHB Educational Foundation, at http://www.pbs.org/wgbh/aso/databank/ entries/dt20ra.html (visited Jan.28, 2003); Elizabeth McLeod, *Which Was the First U.S. Radio Station?*, (July 8, 1998) at http://members/aol/com/jeff99500/first.html (visited Feb. 3, 2003). Rich Brown, B'CASTING (Dec. 9, 1991, Supp.) at 6; Jeff Miller, *A Chronology of AM Radio Broadcasting Part 1: 1900-1922* (Nov. 11, 2002) at http://members/aol/com/jeff560/chrono1.html (visited Jan. 31, 2003).

[144] A year after the first licensed commercial broadcast, there were only 100,000 homes with radio, representing only 0.2% of the population. SCHRODERS INT'L MEDIA AND ENT. RPT 2000 (Schroders & Co., 2000) at 257 ("SCHRODERS MEDIA REPORT 2000").

[145] Miller, *supra* note 146 (citing, Joseph Narhan Kane, Steven Anzovin, and Janet Podell, FAMOUS FIRST FACTS (HW Wilson Company, 1998); Bunzel, *supra* note 146.

[146] Miller, *supra*, (citing Kane, Anzovin, and Podell, *supra*).

[147] SCHRODERS MEDIA REPORT 2000, *supra* note 147 at 257.

[148] *Id.*

and 5.7 million radio sets, generating a weekly radio audience of 23 million listeners.[149]

93. In only a decade, radio became important in the daily lives of Americans. By 1931, there were more than 600 radio stations and 12 million radio sets.[150] Unlike today's targeted, niche programming, however, a typical radio station's programming in the early 1930's was largely "variety" format, including a small amount of many different types of programming.[151] Notable and newsworthy events were, of course, the exception to the variety format. In 1932, for example, several New York area radio stations provided continuous coverage of the Lindbergh kidnapping, the first such reporting of its time.[152] The following year, President Roosevelt began delivering his now famous "Fireside Chats." The first of Roosevelt's thirty Fireside Chats occurred on Sunday, March 12, 1933, the nadir of the Great Depression. Those who listened to Roosevelt's broadcast on March 12th heard the President deliver a reassuring message in a calm voice, an impossible conveyance for print media.[153] Roosevelt's voice brought hope to many Americans, who were at the time in need of a direct, personal message from their president. Radio also provided Americans with levity and diversion during the economic hard times of the Depression. Shows like Amos and Andy (1928-1960), Rin-Tin-Tin (1930-1955) and Little Orphan Annie (1931-1942) provided accessible entertainment to a mass audience.[154]

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[149] Bunzel, *supra* note 146 at 27.

[150] Brown, *supra* note 146 at 6.

[151] Programming was made up of about 63 percent music, 21 percent educational, 12 percent literature, three percent religion, and one percent "novelties." Stark, *supra* note 145.

[152] Brown, *supra* note 146 at 10.

[153] Robert A. Wilson and Stanley Marcus, *American Greats* (Public Affairs Press) at www.kevinbaker.info/e_ag_fr fc.html (visited Jan. 24, 2003).

[154] Louis V. Genco, *Old-Time Radio: The Golden Years, The Original Old*

94. Much the same way Roosevelt's direct messages provided instant reassurance during the Depression, contemporaneous broadcasts and on-location reporting provided Americans with a new sense of connectedness and authenticity. Direct reports allowed the listening public to hear events for themselves as they unfolded, as opposed to their waiting for the newspapers to provide written, second-hand accounts. The on-location radio broadcast of the explosion of the zeppelin Hindenberg in 1937, was the first coverage of its kind.[155] Similarly, Americans were notified instantly of the Japanese attack on Pearl Harbor via "breaking news bulletins."[156] But it was President Roosevelt's address to the nation, broadcast on December 9, 1941, the day after war was declared, that attained the largest single audience in radio history to date – an estimated 90 million listeners.[157] During World War II, radio proved a vital asset in the dissemination of news and public-service messages, and it boosted the morale of those remaining on the home-front.

2. The Introduction of Television

95. Although General Electric ("GE") began regular television broadcasting from a station in Schenectady, New York, in 1928, it was not until 1941 that the first commercial television station was introduced.[158] By 1945 there were still

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Time Radio WWW Pages (2003) at http://www.old-time.com/golden_age/index.html (visited Jan. 31, 2003).

[155] A Chicago recording team on a routine assignment recorded the Hindenberg explosion. Because of the event, NBC broke its rigid programming rules and put it on the air. Brown, *supra* note 146 at 10.

[156] James F. Widner, *The Bombing of Pearl Harbor* (2000) at http://www/otr.com/r-a-i-new_pear!.html (visited Jan. 31, 2003).

[157] Brown, *supra* note 146 at 11. Between 1981 and 1998, the number of listeners in the average quarter-hour was approximately 24,000 listeners, compared with the estimated 90 million listeners who tuned in to hear Roosevelt's speech. SCHRODERS MEDIA REPORT 2000, *supra* note 147 at 256.

[158] Steven E. Schoenherr, *History of Television* (Dept. of History: U. of San

fewer than 7,000 television sets in the U.S. and only nine stations on the air: three in New York, two in Chicago and Los Angeles, and one in Philadelphia and Schenectady. By 1947, television had begun to gain popular momentum. The children's series Howdy Doody premiered that year as a one-hour Saturday program. Howdy Doody was significant because of its focus on programming for children, marking the first generation of Americans to be raised with television programming.[159] Meet the Press, the first network television news series, also debuted in 1947.[160] Meet the Press is still aired today and remains the longest running series of any kind on network television.[161] In addition to new programming, many radio stars, like George Burns and Gracie Allen, began to move their acts to television in the late 1940's. With World War II over, and the Depression behind them, Americans began to accept television as a cogent means of receiving information and entertainment.

96. It was during the 1950's, that television first became integrated into the daily lives of Americans. In 1951, just ten years after television's introduction to the public, there were more than 108 stations on the air and more than 15 million households with television sets.[162] Additional validation of the still-new technology was evidenced by the mass exodus of advertisers from radio to television.[163] Furthermore, the

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Diego) at http://history.acusd.edu/gen/recording/television1.html (visited Jan. 27, 2003).

[159] Nielsen Media Research, 2000 RPT ON TV: THE FIRST FIFTY YEARS (2000) at 13 ("THE FIRST FIFTY YEARS").

[160] *Id.*

[161] *Id.*

[162] *Stations on the Air 1946-65*, TV FACTBOOK (1965 Ed) (Warren Publishing, 1965) at 45-a; *Statistical Analysis, 1946-64: The Television Industry*, TV FACTBOOK NO. 35 (Warren Publishing, 1965) at 44-a.

[163] *The History of Film & Television* (High-Tech Productions) at http://www.high-techproductions.com/ historyoftelevision.htm (visited Jan. 27, 2003). Variety Magazine describes the exodus of advertisers from Radio

production of popular programming escalated during the 1950's. In 1951, CBS broadcast the first color television program, and I Love Lucy, one of television's first filmed situation-comedies, debuted, remaining one of the most well-known entertainment programs in television history. In 1952, the Today Show debuted.[164] It was the first, and remains the longest running early-morning network show to date.

3. The Multimedia Landscape I – 1960's

97. By 1960, a multi-media landscape began to form, though media at that time was still dominated by broadcast radio and television. Forty years after the introduction of commercial broadcast radio, and 19 years after the introduction of commercial broadcast television, there were 4,086 radio stations and 573 television stations. [165] Approximately 45 million homes had a television in 1960, and about six million of those had more than one television.[166] Relatively few markets had cable systems in 1960, and nationwide there were only about 750,000 cable subscribers.[167] There were approximately 1,700 daily newspapers in 1960 with a total circulation of about 58 million readers.[168]

98. As the chart below reflects, the number of outlets per market[169] in 1960 varied largely by size of the market. The

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to television as "the greatest exhibition of mass hysteria in biz annals." *Id.*

[164] THE FIRST FIFTY YEARS, *supra* note 162 at 13.

[165] B'CASTING & CABLE YEARBOOK 2000 (R.R. Bowker, 2000) at B-250, D-718.

[166] *Statistical Analysis*, TV FACTBOOK NO. 47 (1987 Ed.) at 67-a; *1946-64: The Television Industry*, *supra* note 165 at 44-a.

[167] MOWG Study No. 1, A Comparison of Media Outlets and Owners for Ten Selected Radio Markets by Scott Roberts, Jane Frenette, and Dione Stearns (Sept. 2002) at Table 2 ("MOWG Study No. 1"); Kagan World Media, CABLE TV INVESTOR (May 24, 2002) at 8.

[168] *Historical Statistics of the United States: Colonial Times to 1957*, *supra* note 143 at R 169-72.

[169] This study compared the availability and ownership of media in ten

smallest markets had few choices, while large markets had comparatively more outlets for news, information, and entertainment.

Selected Media Outlet Counts for Ten Radio Markets – 1960

Radio Market	*Radio Mkt Rank*	*Radio Total*		*TV Total*		*Newspapers*	
		Stations	*owners*	*station s*	*owners*	*daily*	*owners*
New York NY	*1*	74	52	7	7	8	8
Kansas City MO	*29*	18	15	3	3	1	1
Birmingham AL	*57*	22	19	4	3	2	1
Little Rock AR	*85*	12	12	3	3	2	2
Lancaster PA	*113*	7	5	5	5	2	1
Burlington VT/ Plattsburgh NY	*141*	10	9	2	2	2	2
Myrtle Beach SC	*169*	4	4	1	1	1	1
Terre Haute IN	*197*	9	7	1	1	2	1
Charlottesvil le VA	*225*	7	4	0	0	1	1
Altoona PA	*253*	6	5	3	3	1	1

Source: MOWG Study No. 1, selected information from Tables 1, 2, and 3.

99. An informal analysis of the news and public interest programming available to the public over television in 1960,[170]

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different radio markets. The radio market represents a core geographic area where most consumers reside. Virtually all media is available from the perspective of these residents. MOWG Study No. 1, Executive Summary, n.1. This market definition is not necessarily consistent with the market definition in our rules.

[170] In this analysis, Commission staff examined current and historic *TV Guide* magazines to determine the amount of differing types of programming (local news, national news and public interest programming) provided by

revealed that in selected sample markets, local news programming in 1960 was limited to approximately one or two hours per-station, per-day (or a total of three to five hours of local news programming produced daily by all television stations combined in a given market).[171] National news programming in 1960 was in most cases limited to anywhere from five minutes per-station, per-day, to one hour per-station, per-day. As a result, in most markets, there was less than one-hour of national news programming broadcast daily by all the stations combined in a given market.[172] Programming characterized as "public interest programming"[173] on average was aired for about two to three hours per-station, per-day (or approximately six to nine hours of public interest programming produced per-day by all stations combined in the markets we reviewed).[174] Faced with this set of facts, FCC Chairman Newt Minow denounced television programming, a "vast wasteland," and urged television broadcasters to program more responsibly.[175] That same day, however, Senator Hubert

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stations in markets of differing sizes. The study examined the amount of programming available in a sample day in three cities, New York, Little Rock, and Terre Haute, selected from the larger group of ten cities represented in MOWG Study No. 1. The three cities chosen for this particular informal study were each chosen to respectively represent small, medium, and large television markets. Programming schedules for between the hours of 6am and midnight on July 1st of the given year were examined for each city to determine how much of each type of programming was available to consumers in the selected market. ("Three City Study").

[171] *Id.* Since consumers can only watch one program at a time, the figures represented in this summary are greater than the actual amount of programming that was potentially available to the average consumer.

[172] *Id.*

[173] Public Interest Programming is defined for these purposes as programming of cultural, civic, children's, family, public affairs and educational interest. *Id.*

[174] *Id.*

[175] On May 9, 1961, FCC Chairman Newton N. Minow said before a meeting of television executives: "I invite each of you to sit down in front of

Humphrey called television "the greatest single achievement in communication that anybody or any area of the world has ever known."[176] As a communication medium, television held great potential, but whether or not television provided a valuable service to the American people was still a point of contention.

4. Television Evolves

100. Just a few years later, few could argue with the notion that television had become a vital tool for the timely dissemination of news and information.[177] Between 1960 and 1963, several historical events were broadcast over television, changing the very medium itself and its role in society. On September 26, 1960, the first of four debates between presidential candidates Richard M. Nixon and John F. Kennedy was televised to an audience of more than 28 million homes.[178] Prior presidential debates had only been broadcast over radio. Historians note that those listening to the debate on radio thought Nixon had won, while those viewing the debate on

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your own television set when your station goes on the air and stay there for the day. . . I can assure you that what you will observe is a vast wasteland." Minow went on to say that: "It is not enough to cater to the nation's whims; you must also serve the nation's needs." *Speeches*, The History Channel.Com at http://www.historychannel.com/cgi-bin/frameit.cgi?p=http%3A//www.historychannel.com/speeches/archive/speech_194.html (visited Apr. 23, 2003).

[176] *Media Literacy: Timeline of Broadcast Television*, University of California at Santa Barbara at http://www.uweb.ucsb.edu/~rena/ttv.html (visited Apr. 23, 2003). In an article run in THE NEW YORK TIMES MAGAZINE in 1966 industry analysts contended that "TV is not an art form or a cultural channel; it is an advertising medium...it seems a bit churlish...of people who watch television to complain that their shows are lousy. They are not supposed to be any good. They are supposed to make money." *Id.* This perspective is still prevalent today. Bob Thompson, *Lust-See TV*, THE NEW YORK TIMES MAGAZINE (Jan. 26, 2003) at W13.

[177] Today, "television dominates in political news and political advertising, provides breaking news, and conveys the immediacy and emotional impact of its visual images." AFL-CIO Comments at 35.

[178] THE FIRST FIFTY YEARS, *supra* note 162 at 30.

television thought Kennedy had won.[179] The use of television by political candidates, and the subsequent need for them to adopt a "television persona," thus ushered in a new era in American politics and a new era for television as an important medium of communications.

101. In 1963, television provided live coverage of Martin Luther King Jr.'s "I Have a Dream" speech."[180] Dr. King's speech was not the first act of the civil rights movement, but its broadcast on national television provided activists nationwide the information and the inspiration on which to mobilize America into one of the most turbulent and progressive eras in its history. Later that year, television unified Americans in mourning when word of President Kennedy's assassination was announced in a breaking news bulletin at 1:40pm EST, November 22, 1963. An estimated 180 million Americans watched their television sets almost continuously for four days, including the reporters themselves, who in many cases knew no more than the viewers.[181] For the first time, the nation was witnessing the same tragic event in unison. Television had become the "window of the world."[182]

5. The Introduction of Non-Broadcast Networks

102. From its beginnings in 1948, through the late 1960's, cable television extended the reach of broadcast television to a

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[179] John F. Kennedy's composed disposition and visual charm contrasted sharply on camera with a seemingly nervous and shifty-eyed Richard Nixon. Steve McClellan and John Eggerton, *Getting the Picture: TV Takes The Stage*, B'CASTING (Dec. 9, 1001) at 33.

[180] Chandler and Cortada, *supra* note 144 at vi.

[181] *America's Long Vigil*, TV GUIDE (Jan. 25, 1964) at http://members.aol.com/jeff570/tvgjfk.html (visited Jan. 27, 2003).

[182] Ron Cochran of ABC news is reported to have said: "Television had actually become the window of the world so many had hoped it might be one day." *Id.*

few more than one million subscribers.[183] These early cable systems (originally known as "community antenna TV systems") were born out of the need to carry television signals into areas where over-the-air reception was either non-existent or of poor quality because of interference. In some cases, cable provided limited amounts of locally distributed non-broadcast programming, but it wasn't until the creation of nationally distributed, non-broadcast cable programming that cable became a competitive medium for the dissemination of news, information, and entertainment. Initially, cable operators provided non-broadcast programming for a fee in order to boost revenue. Such programming was called "premium" or "pay-TV." By doing so, however, they increased consumer interest in cable service, thus boosting subscribership. HBO debuted in 1972 as a regional pay-TV network. In 1975, it became the first major national pay-TV network, distributing its service via satellite technology.[184] Satellite distribution gave HBO the ability to reach all cable subscribers nationwide. The launch of HBO over satellite was closely followed by the launch of the pay-TV network Showtime in 1976. By 1977, pay-TV households surpassed the one million subscriber mark, and total cable subscribership reached 12.2 million subscribers.[185]

103. Other satellite-distributed networks soon followed HBO and Showtime. In 1976, Turner Broadcasting Company launched the first "basic" cable network, TBS by nationally distributing its Atlanta-based broadcast station. Unlike HBO, TBS did not derive its proceeds from subscription fees, but rather all of its revenue derived from the sale of advertising.[186]

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[183] *Supra* note 170 at 8

[184] Brown, *supra* note 146 at 19-21; Matt Stump and Harry Jessell, *Cable, The First Forty Years*, BROADCASTING (Nov. 21, 1988) at 42. Earlier attempts at pay-TV in certain cable systems in the late fifties were short-lived. *Id.*

[185] Brown, *supra*; *see also* CABLE TV INVESTOR, *supra* note 170 at 9.

[186] Years later, TBS received revenues from subscriptions fees charged to

Following TBS, numerous other basic cable networks developed, many providing non-broadcast niche programming; increased competition had resulted in the increased segmentation of the available audience.[187] Unlike the general interest, "variety" programming of the broadcast television networks, many non-broadcast basic cable networks provided highly specialized programming and provided it on a 24-hour basis. Thus, the inclusion of non-broadcast networks in the array of media choices gave the public continuous access to national news, information, and entertainment [e.g., all-sports network, ESPN (1979), children's and family programming network, Nickelodeon (1979), all-news network, CNN (1980), black-entertainment network, BET (1980), and all-weather network, The Weather Channel (1982)].

104. Cable operators subsequently found a market for their services in heavily populated urban areas as well as the predominately small-market rural areas they first served. At the time of HBO's initial national distribution in 1975, total cable subscribership nationwide was approximately 9.8 million.[188] Only five years later in 1980, with the addition of numerous pay-TV and basic cable networks, there were more than 19.2 million subscribers, an increase of 95.3 %.[189] But as a competitor to broadcast radio and television, cable's appeal was primarily national in orientation. Although some regional and local non-broadcast networks were distributed during the 1970's and 1980's, the banner offerings of cable systems during that period were nationally-distributed networks.

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cable operators, in addition to the revenue it derived from advertising.

[187] *See* CST Comments at 3.

[188] Kagan World Media, BROADBAND CABLE FINANCIAL DATABOOK (July 2002) at 7, 10.

[189] CABLE TV INVESTOR, *supra* note 170 at 9.

6. The Introduction of Home-Use Satellite Television Technology

105. Home satellite dish ("HSD") technology was developed not long after satellite distribution technologies were introduced. HSD technology is based on the same system used by cable operators to receive network signals from satellites for delivery over their terrestrial cable systems; HSD is essentially the home reception of signals transmitted by satellites operating in the C-Band frequency.[190] First developed in 1976, HSD technology was commercialized around 1979.[191] At its inception, HSD owners used an eight foot dish to receive unscrambled "feed" programming for free, and scrambled programming purchased in a secondary market from licensed program packagers. Owners of HSD systems could gain access to hundreds of channels of programming placed on C-Band satellites by programmers for national cable distribution.[192] HSD enhanced consumer access to non-broadcast television programming, much the same way cable served to enhance broadcast television service in its early years.[193]

7. The Multimedia Landscape II – 1980's

106. By 1980, traditional media (i.e., broadcast radio and television) still dominated mainstream use, but the public did have other options. Many could now choose among both

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[190] Satellites in the C-Band frequency are also used to transmit programming to cable operators via C-Band receiving dishes at the cable central office or "headend."

[191] *Media Business Corp., History of DTH*, SKY RPT, at http://www.skyreport.com/dth_his.cfm (visited May 19, 2003).

[192] *How Many DTH Households Are Out There Anyway?*, SKY RPT (Oct. 1994) at 1. Much of the decline in HSD subscribership results from owners switching to DBS services. Not only are DBS dishes smaller in size and easier to maintain, but they are also less expensive than typical HSD equipment

[193] At its peak of popularity in 1994, there were an estimated 4.5 million active HSD users, roughly half of whom subscribed to one or more programming services.

broadcast and non-broadcast television programming to access news, information and entertainment. There were more than 9,278 radio stations in 1980, and 1,011 broadcast television stations.[194] Approximately 77.8 million homes had a television in 1980 and about 39.7 million of those had more than one television.[195] There were about 19.2 million cable subscribers and HSD was added to the marketplace in 1980.[196] There were also about 1,745 daily newspapers in 1980 with a total circulation of 62.2 million readers.[197] In addition to the traditional broadcast television stations offered over-the-air and via cable systems, there were also approximately 20 nationally-distributed non-broadcast networks available to the public nationwide and an unknown number of regionally distributed non-broadcast networks.[198]

107. The number of media outlets per market varied in 1980 based on market size, as they had in 1960. Overall, however, as the chart below indicates, most markets seemed to have at least doubled the number of television stations and station owners that they had in 1960.[199]

Selected Media Outlet Counts for Ten Radio Markets – 1980

Radio Market	*Radio Mkt Rank*	*Radio Total*		*TV Total*		*Newspapers*	
		station s	*owners*	*Stations*	*owners*	*daily*	*Owner s*
New York NY	*1*	128	100	17	15	8	8
Kansas City MO	*29*	36	27	6	6	1	1
Birmingham AL	*57*	35	27	7	6	1	1

[194] Cable and Services Vol. 52, TV & CABLE FACTBOOK (1984 ed.) at 17.

[195] Nielsen Report on Television (1982) at 3.

[196] CABLE TV INVESTOR *supra* note 168 at 9.

[197] NAA, FACTS ABOUT NEWSPAPERS (2002) at 4, 12, 14.

[198] *1994 Video Competition Report*, 9 FCC Rcd at 7589-92; *see also 2002 Video Competition Report*, 17 FCC Rcd at 26989-91.

[199] MOWG Study No. 1.

Little Rock AR	*85*	26	23	6	4	2	2
Lancaster PA	*113*	11	7	7	7	2	1
Burlington VT/ Plattsburgh NY	*141*	24	19	10	7	2	2
Myrtle Beach SC	*169*	16	11	4	3	1	1
Terre Haute IN	*197*	18	13	5	5	2	1
Charlottesville VA	*225*	10	7	1	1	1	1
Altoona PA	*253*	12	7	5	5	1	1

Source: MOWG Study No. 1, selected information from Tables 1, 2, and 3.

108. Our informal analysis of the news and public interest programming available to the public via television[200] revealed that, on average, most television stations in the markets we reviewed were airing more local news programming in 1980 than they did in 1960, though some small market stations were airing less local news programming.[201] In addition, in the large

[200] Three City Study, *supra* note 173.

[201] In New York and Little Rock, most television stations aired more hours of local news programming in 1980 than they aired in 1960. Thus, on average, the total number of hours of local news programming aired in a given day was greater than in 1960. In Terre Haute, some television stations aired more hours of local news programming that they aired in 1960, while others aired fewer hours of local news programming than they aired in 1960. Thus, on average, the total number of hours of local news programming aired in Terre Haute on a given day was less than in 1960. Since consumers can only watch one program at a time, the figures represented in this summary of programming available in 1980 are greater than the actual amount of programming that was potentially available to the average consumer, but are relative to the figures in the summary of programming aired in 1960. This does not necessarily hold true for increases resulting from the addition of stations. The additional television stations in the market could be airing programming simultaneously with other stations in the market. Thus these figures would not represent a greater number of hours of programming available to a given consumer, but would represent a greater number of voices in a given market.

market that we studied, New York, there were more television broadcast stations available to the public than there were in 1960, resulting in a greater total amount of local news produced in these markets, on a given day.[202] National news was aired over television broadcast stations for about thirty or forty-five minutes per station per day, an increase over 1960 when many stations aired little or no national news programming.[203] In addition, a non-broadcast television network, CNN, aired national news programming for 24-hours per day, and was available to all those with access to cable or HSD systems, marking a significant shift in viewing habits from the sixties when news and coverage of significant events like the Vietnam War were available only during regularly-scheduled news programming.[204] More broadcast television stations aired public interest programming in 1980 than in 1960, particularly in large and medium-sized markets In addition, there were several new non-broadcast television networks providing public interest programming on a 24-hour basis.[205] In short, the addition of nationally distributed non-broadcast television networks, an increase in the number independent and affiliate broadcast television stations and in the number of hours broadcast per station, resulted in an increase in the news and

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[202] In New York there were five more television broadcast stations available in 1980 than there were in 1960, each airing as much as one to two hours of local news content daily. In Little Rock and Terre Haute, there were the same number of television stations with local news programming in 1980 as there was in 1960. *Id.*

[203] Three City Study.

[204] Brown, supra note 146 at 24; Robert J. Thompson, *500 Channels But No Clear Picture of What We Want*, THE WASHINGTON POST (May 23, 2003) at B3.

[205] Among the non-broadcast television networks providing public interest programming were C-SPAN, launched in 1979; Bravo, launched in 1980; The Family Channel launched in 1977; Nickelodeon, launched in 1979, and The Learning Channel, launched in 1980.

public interest programming available in markets of all sizes between 1960 and 1980.

8. Competitive Pressure Builds: A Crowded Programming Market

109. The amount of competitive programming available on cable continued to increase during the eighties and into the nineties. CNN was the first non-broadcast news network considered formidable competition to the news provided by the well-established broadcast networks in the 1980s.[206] In addition to providing direct competition, CNN provided consumers access to 24-hour news coverage.[207] The concise format of a majority of non-broadcast programming networks (e.g., MTV, which provided music videos; the Weather Channel which provided successive national, regional, and local forecasts; CNN's Headline News, which provided cycling national news briefs), was attractive to audiences who were developing a preference for scanning quickly through the many new channel offerings available to them. While some non-broadcast networks were providing general interest fare in the mold of the traditional broadcast networks (e.g., USA Network, Turner Network Television, TBS), many provided programming geared towards a particular audience interest (e.g., children, young adults, sports, weather, news). Regionally distributed non-broadcast networks also flourished in the 1980's through the 1990's. More than 25 regional networks commenced service in the eighties and more than 51 regional networks commenced service in the nineties. Some of these networks provide regional sports (e.g., Fox Sports Northwest, Fox Sports Cincinnati, SportsChannel Florida),

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[206] Brown, *supra* note 146 at 21. Later, in 1991, CNN captured large audiences with its 24-hour coverage of the Persian Gulf War.

[207] In 1968, coverage of the Vietnam War amounted to the evening newscasts on the broadcast networks. Today, coverage of the War in Iraq is available over the broadcast networks and on three separate "round-the-clock" cable news channels – "72/7." Thompson, *supra* note 207.

regional and local news (e.g., News 12 Long Island, County Television Network San Diego, Pittsburgh Cable News Channel), or regional-interest programming (Sunshine Network, Nippon Golden Network, California Channel).

110. When the Fox broadcast network launched as a challenger to the "Big Three" networks in 1985, it entered the market building on the niche concept employed by the non-broadcast networks. Fox provided general interest fare, like its broadcast competitors, but targeted its programming to the teenage demographic.[208] Later, in January 1995, Paramount and Warner Brothers launched the UPN and WB networks, respectively, both building on similar demographics on which Fox had initially entered the market.[209]

9. Significant Technological Advances: Recorded Media, Digital Compression, and the Internet

111. Several significant advances in technology during the 1980's and 1990's supplied the footing for increased competitive pressure on the media marketplace. Record-and-playback devices and digital technologies transformed traditional and new media into high-capacity, high-quality, interactive outlets for accessing content. The Internet, as an entirely new medium, composed of an amalgam of all the technologies that preceded it, completely transformed the way in which we communicate in unimaginable ways. These advances not only enabled the provision of vast amounts of content they also put more control in the hands of the public, allowing them to control what, when, and how they receive information.

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[208] Brown, *supra* note 146 at 21.

[209] United Paramount Network, *The Facts* at http://www.viacom.com/prodbyunit1.tin?ixBusUnit=30; WTTA–Tampa Bay, Fl, *Warner Bros. Network* at http://wtta38.com/ads/history.htm (visited May 22, 2003).

112. The video-cassette recorder ("VCR"), first introduced in the United States in the mid-1970s, was the first of such empowering technologies. Not until 1982 did the VCR become inexpensive enough to spur widespread adoption by the public.[210] By 1986, more than 13 million VCRs had been sold in the United States.[211] The VCR empowered the public with the ability to stray from the pre-set video programming schedule inherent in broadcast television content. Furthermore, content not available over other video media, or content which had been previously available over broadcast television was created specifically for VCR consumption.

113. More significant than record-and-playback devices, digital technology was used in the development of advanced satellite distribution systems. Prior consumer satellite systems were wholly analog and because of their size, were impossible to deploy in urban areas. Direct broadcast satellite systems ("DBS") provided an all-digital transmission of video programming, employing a small satellite dish, practical for both rural and urban deployment. The public has adopted DBS service at one of the fastest rates of any consumer good in history. At the end of 1994, DBS services had approximately 600,000 subscribers.[212] By 1995, there were more than 2.2 million subscribers, and by 2000, DBS providers had nearly 14.8 million subscribers.[213] Today, DBS is a significant competitor in the market for the delivery of multichannel video programming distribution services ("MVPD"), with more than 18 million subscribers.[214] In fact, between June 2001 and June

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[210] *See Important Events in VCR History* at http://www.sit.wisc.edu/~mklathro/TimIine%20of%20Important%20Events.html (visited Feb. 6, 2003).

[211] *Id.*

[212] Kagan World Media, THE STATE OF DBS 2002 (July 2002) at 4.

[213] Kagan World Media, ECON. OF BASIC CABLE NETWORKS 2002 (Sept. 2001) at 23-27.

[214] *2002 Video Competition Report*, 17 FCC Rcd at 26975.

2002, growth in the number of cable subscriptions leveled off to less than one-half of one percent (0.4%), while DBS's growth rate was 14% for the same time period. [215] Overall, from 1994 until today, DBS subscribership has grown by an average of about 70% each year.[216]

114. DBS provides a much higher channel capacity than most, if not all, cable systems choose to provide. From its inception, DBS operators have been able to transmit over 200 channels of video programming to their subscribers. The presence of DBS in the market for the delivery of subscription video programming has expanded the market, such that now almost all televisions households have access to subscription video. In addition, the competitive presence of DBS has forced cable television services to expand channel capacity and service options.

115. As a result of the introduction of the all-digital DBS technology and its widespread acceptance by the public, cable television operators began replacing much of their original coaxial cable infrastructure with hybrid fiber and coaxial cable ("HFC") networks. By doing so, cable operators were able to employ digital technology to transmit high-quality video signals to their customers. In addition, digital technology expanded the channel capacity of the networks, enabling cable operators to provide vastly more channels of video programming. Many cable operators began offering a "digital tier" of service. First introduced commercially in 1996, "digital cable" does not actually provide digital video to the consumer; rather it uses digital compression technology to provide

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[215] *Id.* 26905.

[216] *See supra* note 215; *see also* Hughes Electronics Corp., *SEC Form 10-K405 for the Year Ended December 31, 2001* at 3-4; *Hughes Electronics Corp., SEC Form 10-K for the Year Ended December 31, 2002* at 3; EchoStar Communications Corp., *SEC Form 10-K for the Year Ended December 31, 2002* at 10.

[216] *Supra* note 216.

additional channels of basic and premium services for an additional fee.[217] At year-end 1996, there were approximately 100,000 digital video subscribers.[218] By year-end 2001 there were approximately 16.7 million digital video subscribers.[219] Digital technology also furthered the ability of cable operators to implement advanced two-way services.[220]

116. Several digital record-and-playback technologies were also introduced in the 1990s. Digital versatile disc ("DVD") players were first introduced in the United States in 1997, and have quickly become popular.[221] The personal video recorder ("PVR"), introduced in 1999, is a device connected to a television set, either embedded in an STB or as a stand-alone device, which uses a hard disk drive, software, and other technology to digitally record and access programming. PVR technology allows a consumer to pause, replay, rewind, fast-

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[217] *See* Paul Kagan Assocs., Inc., *Paul Kagan's 10-Year Cable TV Industry* Projections, THE CABLE TV FINANCIAL DATABOOK (July 1996) at 11; *see also* Paul Kagan Assocs., Inc., *Paul Kagan's 10-Year Cable TV Industry* Projections, THE CABLE TV FINANCIAL DATABOOK (July 1997) at 10. In some cases, the video programming offered on cable's digital tier is offered at a higher quality than standard analog video. In other cases, the digital tier is used simply to compress more analog-quality channels into the same bandwidth.

[218] 1997 DATABOOK, supra at 10.

[219] BROADBAND DATABOOK, *supra* note 191 at 10.

[220] The advanced broadband services discussed here include cable telephony and Internet Protocol ("IP") telephony, Internet access through cable modems, digital video, video-on-demand ("VOD") and near-video-on-demand ("NVOD"), and interactive guides/interactive programming. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 16 FCC Rcd 6005, 6015, n.11 (2001) ("*2000 Video Competition Report*").

[221] Steven Schoenherr, *Recording Technology History* (Oct. 30, 2002) at http://history.acusd.edu/gen/ recording/notes.html (visited Feb. 6, 2003).

forward and otherwise time-shift television programs similar to the VCR.[222]

117. In addition to these other significant technological advancements of the 1980's and 1990's, the Internet has spawned an entirely new way of looking at media. The first graphical Interface for the Internet was proposed in 1989 (later to be called the World Wide Web or the "Web").[223] In 1992, there were only 50 Web sites in the world; a year later there were still no more than 150 Web sites.[224] Then, in late 1993, Mosaic was launched, providing an easy-to-install, easy-to-use program for accessing the Web.[225] By 1994, commercial Web sites proliferated so that by year-end, there were as many as 3,000 Web sites.[226] A year later, there were more than 25,000 Web sites in use.[227] By year-end 2000, there were more than 30 million web sites.[228]

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[222] TiVo Inc., SEC Form 10-K405 (Mar. 30, 2000); ReplayTV Inc., SEC Form S-1/A (May 1, 2000). While PVRs cannot play prerecorded videocassettes or DVDs, they make it relatively simple to record broadcast, cable or DBS television signals and provide the user with the same level of control over the playback of a movie as home video provides.

[223] Prior to this time, the Internet consisted of computers linked in a large-scale network for the purpose of file sharing based on text-only protocols. Shahrooz Feizabadi, *History of the World Wide Web* at http://ei.cs.vt.edu/~wwwbtb/book/chap1/ web_hist.html (visited Feb. 6, 2003); Walt Howe, *A Brief History of the Internet* (Apr. 2002) at http://www.walthowe.com/navnet/history.html (visited Feb. 6, 2003).

[224] Richard Griffiths, *Chapter Two: From ARPANET to World Wide Web* at http://www.leidenuniv.nl/ history/ivh/chap2.htm (visited Feb. 6, 2003).

[225] *Id.*; Walt Howe, *A Brief History of the Internet* (Apr. 2002) at http://www.walthowe.com/navnet/ history.html (visited Feb. 6, 2003); Robert H Zakon, *Hobbes' Internet Timeline v6.0, 2003* at http://www.zakon.org/Robert/ internet/timeline/ (visited Feb. 6, 2003).

[226] *Supra* note 227.

[227] *Id.*

[228] *Id.* While most of the information currently on the Web is "still-graphics," real-time and downloadable video available over the Web has

118. Today the Internet affects every aspect of media, from video and audio, to print and personal communications.[229] Whereas other forms of media allow for only a finite number of voices and editorially-controlled viewpoints, the Internet provides the forum for an unlimited number of voices, independently administered. Furthermore, content on the Web is multi-media; it can be read, viewed, and heard simultaneously. Since Web pages are stored on Web-hosting file servers, accessing Web content is a highly individualized activity, and any individual with access to a Web browser can access all available Web content 24-hours a day throughout the world.

119. Virtually every major media company has a corresponding Web site, today, and any individual with access to a Web-hosting file server can create a Web site for public access. As such, the Web provides an unrestrained forum for the dissemination and consumption of ideas. News and Information are available on the Internet like they have never been available to the public before. Internet users can view the news source of their own choosing, such as CNN or The New York Times, or can use a news gathering service like Google News which presents information culled from approximately 4,500 news sources worldwide.[230] Furthermore, Internet users can access content that may have appeared in print or on broadcast television at an earlier time, giving them greater control over traditionally available content.

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become more commonplace.

[229] Fox Comments at iii.

[230] *A Novel Approach to News*, Google News (BETA) at http://www.google.com/help/about_news_search.html (visited May 27, 2003). The headlines that appear on Google news are selected entirely by computer algorithms, based on how and where the stories appear elsewhere on the web. There are no human editors at Google selecting or grouping the headlines and no individual decides which stories get top placement.

10. The Multimedia Landscape III – 2000

120. Since the 1960's, there has been tremendous growth in the media market.[231] By 2000, American consumers had access to a multitude of media outlets, hundreds of channels of video programming, and enormous amounts of content not available just twenty, or even ten years earlier. There were more than 12,615 radio stations in 2000, and 1,616 broadcast television stations.[232] Approximately 100.8 million homes had a television in 2000 and 76.2 million of those had more than one television.[233] There were 68.5 million cable subscribers in 2000, approximately 14.8 million DBS subscribers and 1.2 million HSD subscribers.[234] There also were 1,480 daily newspapers in 2000 with a total circulation of 55.8 million readers.[235] In addition to the traditional broadcast television stations offered over-the-air and via cable systems, there were 281 nationally-distributed non-broadcast networks available in 2000 and 80 regional non-broadcast networks.[236] Approximately 42.5 million households subscribed to an Internet access provider in 2000.[237]

121. The number of outlets per market also grew significantly between 1980 and 2000. As the chart below

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[231] NAB Comments at 8-9.

[232] B'CASTING & CABLE YEARBOOK 2002-2003 at B-241, D-739.

[233] Nielsen Media Research.

[234] *2002 Video Competition Report*, 17 FCC Rcd at 26911, Table 1; *see supra* note 216.

[235] NAA, *supra* note 200 at 4, 12, 14.

[236] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 17 FCC Rcd 1244, 1249-1253 (2002) ("*2001 Video Competition Report*").

[237] ECONOMICS OF BASIC CABLE NETWORKS 2002, *supra* 216 at 23-27; Veronis Suhler Stevenson-Media Merchant Bank, *Internet Households and Household Penetration*, COMMUNICATIONS INDUSTRY FORECAST (July 2002) at 267.

indicates the number of radio outlets grew by 142% from 1960 to 2000 and the number of independent radio station owners grew by 74% in that same time period. The number of television outlets grew by 217% from 1960 to 2000 and the number of independent television station owners grew by 150% in that same time period. The number of newspapers declined by 9% from 1960 to 2000 and the number of newspaper owners was the same in 2000 as it was in 1960.

Selected Media Outlet Counts for Ten Radio Markets – 1960,1980, 2000

Radio Market	*Radio Mkt Rank*	*Year*	*Radio Total*		*TV Total*		*Newspapers*	
			stations	*owners*	*stations*	*owners*	*daily*	*owners*
New York NY	*1*	*2000*	148	84	24	22	9	9
		1980	128	100	17	15	8	8
		1960	74	52	7	7	8	8
Kansas City MO	*29*	*2000*	40	22	9	7	1	1
		1980	36	27	6	6	1	1
		1960	18	15	3	3	1	1
Birmingham AL	*57*	*2000*	45	25	9	8	2	2
		1980	35	27	7	6	1	1
		1960	22	19	4	3	2	1
Little Rock AR	*85*	*2000*	42	21	13	8	2	2
		1980	26	23	6	4	2	2
		1960	12	12	3	3	2	2
Lancaster PA	*113*	*2000*	13	11	7	2	2	1
		1980	11	7	7	7	2	1
		1960	7	5	5	5	2	1
Burlington VT/ Plattsburgh NY	*141*	*2000*	37	22	11	7	2	2
		1980	24	19	10	7	2	2
		1960	10	9	2	2	2	2
Myrtle Beach SC	*169*	*2000*	29	16	6	4	0	0
		1980	16	11	4	3	1	1
		1960	4	4	1	1	1	1
Terre Haute IN	*197*	*2000*	24	14	5	5	1	1
		1980	18	13	5	5	2	1
		1960	9	7	1	1	2	1
Charlottesville VA	*225*	*2000*	17	8	2	2	1	1
		1980	10	7	1	1	1	1
		1960	7	4	0	0	1	1
Altoona PA	*253*	*2000*	14	7	6	5	0	0
		1980	12	7	5	5	1	1
		1960	6	5	3	3	1	1

Source: MOWG Study No. 1, selected information from Tables 1, 2, and 3.

122. The number of hours of news and public interest programming has also grown significantly since 1980. Whereas in 1960 and 1980, there was on average only about one or two hours of local news programming per-station, per-day in the markets we reviewed, local news programming expanded to about two to four hours per station per day by 2003.[238] In addition, several regional and local news networks were launched between 1980 and 2003, providing local news on a 24-hour basis in numerous markets throughout the country.[239] Although in most markets, only a few stations increased the amount of national news programming available from 1980, when national news was aired for about thirty to forty five minutes per station per day, there were more broadcast stations airing national news in 2003, and several non-broadcast news networks airing national news programming on a 24-hour a day basis.[240] Public interest programming also has proliferated. Although television broadcast stations in various markets were airing about the same amount of public interest programming per-station in 2003 as they were in 1980, in 2003, there are more television broadcast stations per-market and numerous new non-broadcast networks providing such programming.[241]

11. The Current Competitive Landscape and Developments Since 2000.

123. Non-broadcast television programming continue to proliferate. Today, there are more than 308 satellite-delivered national non-broadcast television networks available for carriage over cable, DBS and other multichannel video program

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[238] Three City Study, *supra* note 173.

[239] Regional news networks available over cable and DBS include: San Diego's News Channel 15, NorthWest Cable News, Ohio News Network, Pittsburgh Cable News Channel; News 12 Connecticut, News 12 Long Island, News 12, New Jersey, New England Cable News, Las Vegas One News, News 8 Austin, etc.

[240] *E.g.*, Fox News, MSNBC, and CNBC.

[241] *E.g.*, Disney, Discovery, History Channel, etc.

distribution ("MVPD") systems.[242] In 2002, the Commission also identified at least 86 regional non-broadcast networks, including 31 sports channels, and 32 regional and local news networks.[243] We are moving to a system served by literally hundreds of networks serving all conceivable interests. Programming in particular abundance are sports, entertainment, and informational in nature.[244] The four largest broadcast networks own both broadcast and cable channels. Their share of viewership is far greater than their share of the channels received by the typical American household.[245] Of the 102 channels received by the average viewing home, the four largest broadcast networks have an ownership interest in approximately 25% of those channels.[246]

124. Since its inception, non-broadcast programming has gained significantly in popularity as compared with broadcast programming. In 2002, for the first time, cable television collectively had more primetime viewers on average over the course of the year than broadcast programming (48% share for cable programming versus 46% share for broadcast programming).[247] In June 2002, cable networks for the very first time collectively exceeded a 50% share for the month (54% primetime share), while the broadcast networks

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[242] *2002 Video Competition Report*, 17 FCC Rcd at 26905.

[243] *Id.* at 26907-8.

[244] CST Comments at 3-4.

[245] Nielsen Galaxy Explorer; *Nielsen Ratings*, B'CASTING & CABLE (Mar. 24, 2003) at 14; *2002 Video Competition Report*, 17 FCC Rcd at 26995-97; *Who Owns What*, Columbia University Law School at www.cjr.org.

[246] Opening Statement of David F. Poltrack, Executive Vice President, CBS Television, before the Forum on Media Ownership Rules, Columbia University Law School, New York, NY (Jan. 16, 2003) ("Poltrack Statement").

[247] Mike Reynolds, *2002: Cable's Breakout Nielsen Year*, MULTICHANNEL NEWS (Jan. 6, 2003) at 3.

collectively registered a 38% primetime share.[248] The September 2002 season premier of "The Sopranos" on HBO was the most watched original program in HBO history and was the week's most watched program among adults 18-34.[249] The season finale in December was the top-rated program that night with 12.5 million viewers, besting the 12.2 million viewers for the top-rated network broadcast program.[250] Furthermore, HBO had more 2002 Golden Globe nominations than any other network (broadcast and non-broadcast alike), and went on to win twice as many awards as any other network.[251] At the 2002 Primetime Emmys, HBO won 24 Emmys, tying NBC for the most awards given to a single network.[252]

125. As television broadcasters face intense competitive pressure from alternative video programming, they are entering a new era themselves. Broadcasters are currently experimenting with, and beginning to commercially deploy, digital and high-definition television ("DTV" and "HDTV"). Commenters in this proceeding have said that Federal policy should have as one of its main objectives, the encouragement of digital conversion and expansion of transmission plants.[253] The Commission anticipates the full transition of broadcast signals such that broadcast television signal distribution will be either DTV or HDTV, replacing the NTSC analog standard. Digital television offers improved picture quality over standard analog television, and the ability for broadcasters to provide such additional enhancements as HTDV (superior quality to analog

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[248] Allison Romano, *Cable Breaks 50-Share Mark in Primetime*, B'CASTING & CABLE (July 8, 2002) at 12.

[249] AOL Time Warner, *Home Box Office: Key Company Facts* at http://www/aoltw.com/companies/hbo_ index.adp (visited May 21, 2003).

[250] *Id.*

[251] *Id.*

[252] *Id.*

[253] CST Comments at 4.

television), multicasting (the ability to offer multiple channels in a spectrum band that today would allow only a single transmission stream), and interactivity (two-way communication abilities between the broadcaster and the consumer). Cable operators and DBS service providers are also beginning to provide DTV and HDTV options.

126. While the surge of media availability in the last several years has led to an increase in the quantity and quality of programming available, the competitiveness between different video media has also led to increased individual choice. Today's media marketplace provides choices to the public on an entirely new, personal level. In addition to the Web, for example, video-on-demand ("VOD") is the newest video technology being developed and deployed by cable and DBS operators. VOD services provide advertising-free material on a program-by-program basis, similar to the pay-per-view services that preceded it. VOD, however, provides a much wider array of programming and choice of viewing time than its pay-per-view predecessor. VOD also provides VCR-like pause and rewind capabilities, unlike pay-per-view which is cablecast from beginning to end, the same to each home. Some cable operators are opting to offer video-on-demand via the subscription model ("SVOD"). In the SVOD model, the subscriber pays one monthly fee for unlimited access to a finite library of select programming. This model more closely resembles the premium service (or pay-TV) tier.

127. In addition, satellite radio became available in 2001, providing subscribers over 100 channels of commercial-free, digital audio.[254] As of April 2003, there were over 500,000 subscribers to satellite radio.[255]

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[254] XM Satellite Radio, Inc., *XM Tops One-Half Million Subscriber Mark*, (press release) (Apr. 14, 2002); Sirius Satellite Radio, *Overview*, at http://www.siriusradio.com (visited May 1, 2003).

[255] XM Satellite Radio, Inc., *supra*.

128. In short, there are far more types of media available today, far more outlets per-type of media today, and far more news and public interest programming options available to the public today than ever before. Although many of these new outlets are subscription-based (e.g., non-broadcast networks available over cable and DBS, Web content available via a subscription Internet connection), the competitive pressure placed upon free, over-the-air media has led to better quality and in some cases, an increase in the quantity of some types of content. In the next five to ten years, we expect more free, over-the-air content to become available as new technologies (i.e., digital transmission) are applied to these traditional media (i.e., broadcast television).

V. LOCAL AND NATIONAL FRAMEWORK

129. We adopt herein limits both for local radio and local television station ownership. Both of these rules are premised on well-established competition theory and are intended to preserve a healthy and robust competition among broadcasters in each service. As explained below, however, because markets defined for competition purposes (*i.e.*, defined in terms of which entities compete with each other in economic terms) are generally more narrow than markets defined for diversity purposes (*i.e.*, defined in terms of which entities compete in the dissemination of ideas), our ownership limits on radio and television ownership also serve our diversity goal. By ensuring that several competitors remain within each of the radio and television services, we also ensure that a number of independent outlets for viewpoint will remain in every local market, thereby ensuring that our diversity goal will be promoted. Further, though, because local television and radio ownership limits cannot protect against losses in diversity that might result from combinations of different types of media within a local market, we adopt below a set of specific cross-media limits.

130. Similarly, by virtue of the staff's extensive information gathering efforts and the voluminous record assembled in this rulemaking docket, we have for the first time substantial evidence regarding the localism effects of our national broadcast ownership rules. We can, therefore, with more confidence than ever, establish a reasonable limit on the national station ownership reach of broadcast networks. We continue to prohibit a combination between two of the largest four networks primarily on competition grounds, but the beneficial effects of this restriction also protect our interest in preserving localism. In combination, our new national broadcast ownership reach cap and our "dual network" prohibition will ensure that local television stations remain responsive to their local communities.

131. In sum, the modified broadcast ownership structure we adopt today will serve our traditional goals of promoting competition, diversity, and localism in broadcast services. The new rules are not blind to the world around them, but reflective of it; they are, to borrow from our governing statute, necessary in the public interest.

VI. LOCAL OWNERSHIP RULES

A. Local TV Multiple Ownership Rule

132. The current local TV ownership rule allows an entity to own two television stations in the same DMA, provided: (1) the Grade B contours of the stations do not overlap; or (2) (a) at least one of the stations is not ranked among the four highest-ranked stations in the DMA, and (b) at least eight independently owned and operating commercial or non-commercial full-power broadcast television stations would remain in the DMA after the proposed combination ("top four-ranked/eight voices test").[256] Only those stations whose Grade B signal contours overlap with the Grade B contour of at least

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[256] 47 C.F.R. § 73.3555(b); *Local TV Ownership Report and Order*, 14 FCC Rcd at 12907-08 ¶ 8.

one of the stations in the proposed combination are counted as voices under the rule.[257]

133. Having examined the competitive impact of other video programming outlets on television broadcast stations, we conclude, in light of the myriad sources of competition to local television broadcast stations, that our current local TV ownership rule is not necessary in the public interest to promote competition. We also conclude from our review of the record that media other than television broadcast stations contribute to viewpoint diversity in local markets. Because our current local TV ownership rule is premised on the notion that only local TV stations contribute to viewpoint diversity and does not account for the contributions of other media, we conclude the current rule is not the best means to promote our diversity goal. Moreover, we conclude that retaining our current rule does not promote, and may even hinder, program diversity and localism. However, we find that some limitations on local television ownership are necessary to promote competition. Accordingly, pursuant to the directive of Section 202(h), we herein modify our local TV ownership rule.

134. Our modified local TV ownership rule will permit an entity to have an attributable interest in two television broadcast stations in markets with 17 or fewer television stations; and up to three stations in markets with 18 or more television stations. To further ensure that no single entity possesses excessive market power, however, we will prohibit combinations which would result in a single entity acquiring more than one station that is ranked among the top four stations in the market based on audience share. As a result, no combinations will be permitted in markets with fewer than five television stations. Because we have determined that Nielsen DMAs are the relevant geographic market, common ownership of stations in the same market will be subject to this standard

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[257] *Local TV Ownership Recon. Order*, 16 FCC Rcd at 1072-73 ¶¶ 16-18.

without regard to whether the affected stations have overlapping contours, and we eliminate the provision of our local TV ownership rule that permits same-market combinations where there is no Grade B contour overlap. We also modify our existing standard for waiver of the local TV ownership rule.

135. *Background.* The Commission adopted a rule prohibiting common ownership of two TV stations with intersecting Grade B contours in 1964.[258] The rule was based in part on the Commission's earlier "diversification of service" rationale, which reflected the belief that diversity concerns were best promoted by a multiplicity of separately owned outlets.[259] In 1996, Congress directed the Commission to "conduct a rulemaking proceeding to determine whether to retain, modify, or eliminate its limitations on the number of television stations that a person or entity may own, operate, or control, or have a cognizable interest in, within the same television market."[260] The Commission revised the rule to its current form in 1999, citing as reasons the growth in the number and variety of local media outlets and the efficiencies and public service benefits that can be obtained from joint ownership.[261] The Commission also sought to "facilitate further development of competition in the video marketplace and to strengthen the potential of broadcasters to serve the public interest."[262]

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[258] *1964 Media Ownership Report and Order*, *supra* note 56.

[259] *Genesee Radio Corp.*, *supra* note 88.

[260] 1996 Act, § 202(c)(2).

[261] *Local TV Ownership Report and Order*, 14 FCC Rcd at 12930-31 ¶¶ 57-58.

[262] *Id.* at 12903 ¶ 1. The Commission made relatively minor changes to the rule on reconsideration. *See Local TV Ownership Recon. Order*, *supra* note 96.

136. In *Sinclair Broadcast Group, Inc. v. FCC*,[263] the court reviewed the Commission's decision modifying the local TV ownership rule.[264] The court held that there was a rational relationship between the rule and our diversity and competition goals. The court noted that choosing the number eight and defining voices "are quintessentially matters of line drawing invoking the Commission's expertise in projecting market results," and did not decide the issue of whether eight is the appropriate numerical limit. The court invalidated, however, the Commission's definition of voices under the rule because it did not adequately explain its decision to include only broadcast television stations as voices. The court pointed out that the definition was inconsistent with the definition of voices for the radio/TV cross-ownership rule,[265] which also considers major newspapers and cable television to be voices. The court observed that "[o]n remand, the Commission conceivably may determine to adjust not only the definition of 'voices' but also the numerical limit."[266]

1. The Current Rule Cannot be Justified Under Section 202(h)

137. Under Section 202(h), we consider whether the local TV ownership rule continues to be "necessary in the public interest as a result of competition." Our *Notice* sought comment on this issue, including the following specific questions: (a) whether the rule presently serves its original purposes of furthering diversity and facilitating competition in the marketplace; (b) whether the rule promotes other policy goals discussed in the *Notice*; and (c) whether, if the rule serves

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[263] *See Sinclair*, *supra* note 7.

[264] In *Sinclair*, the court reviewed challenges to the local TV ownership rule as well as to grandfathering provisions related to local marketing agreements. *Id.* 284 F.3d at 162.

[265] 47 C.F.R. § 73.3555(c)(iii, iv).

[266] *Sinclair*, 284 F.3d at 162.

some of our purposes and disserves others, the balance of its effects argues for keeping, revising, or eliminating the rule.[267]

138. Commenters proposing repeal or relaxation of the rule believe that the rule is not necessary in the public interest to achieve its intended competition and diversity goals.[268] They assert that, to the contrary, the rule is harming competition by preventing broadcasters from achieving efficiencies that will allow them to compete more effectively with other media outlets, including video programming available via cable, DBS, home video, and video rentals, as well as other media such as radio, digital audio radio service ("DARS"), newspapers and the Internet. These commenters contend that the current rule, by focusing solely on competition among local television broadcast stations, fails to account for today's competitive media marketplace.[269] They likewise contend that in light of the broad range of media options available to the public, the rule is no longer necessary in the public interest to promote our diversity goal.[270] These commenters argue that if the rule is

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[267] *Notice*, 17 FCC Rcd at 18528 ¶ 75.

[268] Alaska Comments at 3; Statement of Victor B. Miller IV, Senior Managing Director, Bear, Stearns & Co. at FCC Field Hearing on Media Ownership (Feb. 27, 2002) at 5 ("Bear Stearns En Banc Statement"); Block Comments at 5; Bonneville Comments at 5; Coalition Broadcasters Comments at 11-13; Emmis Comments at 14; Fox Comments at 3-5; FMBC Comments at 1-2; Gannett Comments at 21-28; Granite Comments at 11-12; Gray Comments at 16; NAB Comments at I, 5-6; Nexstar Comments at 16; Paxson Comments at 4; Sinclair Comments at 20-21.

[269] Alaska Comments at 4-5, Bear Stearns En Banc Statement at 1, 5; Belo Comments at 14, 25; Coalition Broadcasters Comments at 4-6; Duhamel Comments at 5-6; Emmis Comments at 31-33; Fox Comments at 3, 6; Gray Comments at 6-16; Granite Comments at 3-6, 8-10; Hearst-Argyle Reply Comments at 2-6; Media General *et al*. Comments at 3-7; NAB Comments at 8-14; Nexstar Comments at 13-18; Pappas Comments at 12-14; Paxson Comments at 5-6, 29-30; Sinclair Comments at 8-19.

[270] Alaska Comments at 4-5, Bear Stearns En Banc Statement at 5, Belo Comments at 12-19; Coalition Broadcasters Comments at 4-8; Duhamel Comments at 7; Emmis Comments at 25-30; Fox Comments at 33-34; Gray

relaxed or repealed, single owners of multiple television broadcast outlets will have an equal or enhanced incentive and ability to offer programming that is diverse in terms of both viewpoint and program format.[271] Finally, these commenters contend that the current rule does not promote localism. Rather, they contend that the rule is harming localism by preventing combinations that would yield efficiencies that would expand local news offerings and other programming relevant to the needs and interests of viewers in local markets.[272]

139. Commenters who urge us to retain the current rule assert that relaxation of the rule will harm competition, diversity, and localism.[273] These commenters contend that competition will be harmed because non-consolidated broadcasters will face anticompetitive behavior from broadcasters who own more than one station within a local market.[274] They assert that there is a clear connection between

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Comments at 6-15; Granite Comments at 10-11; Hearst-Argyle Reply Comments at 8-9; Media General *et al.* Comments at 7; NAB Comments at 15-18; Nexstar Comments at 6-13; Pappas Comments at 12-15; Paxson Comments at 27-29; Sinclair Comments at 20-37.

[271] Alaska Comments at 6; Bear Stearns En Banc Statement at 5; Belo Comments at 22-24; Coalition Broadcasters Comments at 6-7; Duhamel Comments at 6-7; Fox Comments at 30-32; Gray Comments at 17; Granite Comments at 14; Hearst-Argyle Reply Comments at 7-8; Media General *et al.* Comments at 2; NAB Comments at 36-37; Nexstar Comments at 10, 13; Pappas Comments at 14; Sinclair Comments at 16-18, 26-27.

[272] Alaska Comments at 5-6; Bear Stearns En Banc Statement at 5; Belo Comments at 12; Coalition Broadcasters Comments at 4-5; Fox Comments at 35-41; Gray Comments at 16-19; Granite Comments at 3-7; Media General *et al.* Comments at 5, 7; NAB Comments at 40; Paxson Comments at 28; Sinclair Comments at 30, 54.

[273] AFL-CIO Comments at 49; AFTRA Comments at 3, 14; CFA Comments at 184; CWA Comments at ii, 16; Children Now Comments at 11-12, 18, 23; Entravision Comments at 3-8; UCC Comments at 39-41.

[274] AFL-CIO Comments at 31; AFTRA Comments at 3, 25-26; CFA Comments at 186-187. Entravision makes a similar assertion, although it

ownership and viewpoint diversity because owners can and do express viewpoints through their editorial control over what is aired.[275] They urge us to retain the current rule in order to promote the public's First Amendment interest in a robust marketplace of ideas, and to protect the viewpoint diversity that they state is critical to ensuring an informed electorate.[276] They also contend that further consolidation in local television markets will result in less local control over programming.[277] We address each of these arguments below in our analysis of whether the current rule remains necessary in the public interest as required by section 202(h).

a. Competition

140. We conclude that the current local TV ownership rule is not necessary to protect competition. By limiting common ownership of television stations in local markets where at least eight independently owned TV stations would remain post-merger, the current rule prohibits mergers that would increase efficiency in small and mid-sized markets—mergers that would thereby promote competition. In addition, by limiting common ownership to no more than two television stations, the current rule prohibits efficiency enhancing mergers in the largest markets. The current rule also prohibits mergers among the top four-ranked stations.[278] After reviewing all of the record

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does not take a position on whether to relax the local ownership rule. Entravision Comments at 6-10. Instead, Entravision proposes that we address anticompetitive conduct by establishing certain other requirements. *Id.*

[275] AFL-CIO Comments at 15-25; AFTRA Comments at 11-14; CFA Comments at 263; CWA Comments at 28-32; UCC Comments at 4-9.

[276] AFL-CIO Comments at 3, 5-9; AFTRA Comments at 11; CFA Comments at 30-32; CWA Comments at 1-3; UCC Comments at 61-64.

[277] AFL-CIO Comments at 51-53; AFTRA Comments at 10-12; CFA Comments at 250-252; CWA Comments at 30-32; Children Now Comments at 12; UCC Comments at 12-17.

[278] "The 'top four-ranked station' component of this standard is designed to

evidence, we conclude that this restriction remains necessary to promote competition, so we are retaining a prohibition on mergers of the top four-ranked stations in the modified local TV ownership rule we are adopting today. Today's decision benefits from numerous empirical studies that provide a wealth of competition information not previously available.[279]

141. In the *Notice*, we requested comment on the definition of the product and geographic markets in which broadcast television stations compete. Based on the record, we conclude that broadcast television stations operate in three product markets: a market for delivered video programming ("DVP"); a video advertising market; and a video program production market.[280] Although each of these markets is discussed below, our primary concern is promoting competition for viewers. Therefore, we will focus on competition in the DVP market. It is this market that directly affects viewers. The advertising market and the program production market are of concern to the Commission only to the extent that protecting competition in these markets may add an extra level of protection for the public and enable all television broadcasters to compete fairly for advertising revenue and programming. What is critical to our competition policy goals, however, is the assurance of a sufficient number of strong rivals actively engaged in competition for viewing audiences. As long as there are

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ensure that the largest stations in the market do not combine and create potential competition concerns. These stations generally have a large share of the audience and advertising market in their area, and requiring them to operate independently will promote competition." *Local TV Ownership Report and Order*, 14 FCC Rcd at 12933-34 ¶ 66.

[279] *See, e.g., Id.* at 12918 ¶ 31. ("We are aware of no definitive empirical studies that quantify the extent to which the various media are substitutable in local markets.").

[280] Fox Comments, Exhibit 3, Bruce M. Owen, *Statement on Media Ownership Rules* (Jan. 2003) at 1-2 ("Fox Comments, Owen Statement").

numerous rival firms in the DVP market, viewers' interests will be advanced. We first analyze the DVP market.

(i) The DVP Market

142. The evidence in the record suggests that television viewers do not consider non-video entertainment alternatives (*e.g.*, reading and listening to music) and non-delivered video (*e.g.*, VCRs/DVDs and movie theaters) to be good substitutes for watching television.[281] In defining the market, we follow the *DOJ/FTC Merger Guidelines* and ask whether the availability of entertainment alternatives is sufficient to prevent a significant and non-transitory increase in price. If they were good substitutes to watching television, relative changes in prices or other competitive variables should change household consumption of television.[282] The record evidence suggests, however, that, while the price of subscribing to cable and DBS has increased faster than the rate of inflation, these price increases have not resulted in households dropping their subscriptions to cable and DBS,[283] or reducing the amount of

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[281] In defining the relevant product market for merger analysis, one starts with the products supplied by the merging firms and asks whether a monopolist, supplying those products, would profitably impose "a small but significant and non-transitory price increase." If the monopolist would not be able to impose such a price increase, then one adds in the next closest substitute to the products of the merging firms and repeats the experiment. Gregory J. Werden, *The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm*, at http://www.usdoj.gov/atr/hmerger/11256.htm (visited Mar. 20, 2003). This approach has been referred to as the "smallest market principle."

[282] Horizontal Merger Guidelines issued by the U.S. Department of Justice and the Federal Trade Commission, 57 Fed. Reg. 41552 (dated Apr. 2, 1992, revised, Apr. 8, 1997) ("*DOJ/FTC Merger Guidelines*"). Section 1.11 of the *DOJ/FTC Merger Guidelines* states: "In considering the likely reaction of buyers to a price increase, the Agency will take into account all relevant evidence, including, but not limited to, the following: (1) evidence that buyers have shifted or have considered shifting purchases between products in response to relative changes in price or other competitive variables..."

[283] Over the past several years, despite the fact that prices for MVPD

time households spend watching television. In fact, the amount of time households spend watching DVP on television has remained unchanged for 30 years.[284] Thus, DVP providers have indeed been able to impose non-transitory price increases. This suggests that the relevant product market is no broader than DVP and should not include all entertainment activities.

143. For most viewers the programming choices offered by local broadcast television stations and cable networks represent good alternatives for one another. Most households subscribe to cable or DBS and receive DVP from cable networks and local broadcast television stations.[285] These viewers need only touch their remote control to switch between the programming offered by cable networks and that of local broadcast television

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service, particularly cable, have increased significantly, the percentage of households subscribing to such service also has increased. *See, 2002 Video Competition Report*, *supra* note 98. *See also Reports*, 1994-2001: *1994 Video Competition Report*, *supra* note 138; *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 11 FCC Rcd 2060 (1996) (*"1995 Video Competition Report"*); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 12 FCC Rcd 4358 (1997) (*"1996 Video Competition Report"*); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 13 FCC Rcd 1034 (1998) (*"1997 Report"*); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 13 FCC Rcd 24284 (1998) (*"1998 Video Competition Report"*); and *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 15 FCC Rcd 978 (2000) (*"1999 Video Competition Report"*); *2000 Video Competition Report*, *supra* note 223; *2001 Video Competition Report*, *supra* note 239.

[284] Adults spent 46.5 percent of their total leisure time watching television in 1970 and 46.1 percent in 2000. Harold L. Vogel, ENT. INDUS. ECON.: A GUIDE FOR FINANCIAL ANALYSIS (5th Ed) at 9. The 46.1 percent statistic includes time spent watching network affiliates, independent stations, basic cable programs and pay cable programs. It does not include non-delivered video such as movie theaters, video tapes, and video games.

[285] Our most recent Annual Video Competition Report found that 85.25% of all U.S. television households subscribe to an MVPD. *See 2002 Video Competition Report*, 17 FCC Rcd 26901 at Appendix B, Table B-1.

stations. The ease of switching from broadcast to cable networks for these households provides strong incentives for cable networks and local broadcast television stations to provide programs that attract viewers. The owners of cable networks and local broadcast television stations know that anything that reduces a program's appeal will cause cable and DBS subscribers to switch to programming offered by other cable networks or broadcast stations.[286] As such, all the broadcast television stations and cable networks available to a significant number of cable subscribers in a DMA should be included as participants in the market for DVP.

144. The programming quality delivered to the minority of households that do not subscribe to cable or DBS is protected by the majority of households that do subscribe. Although non-subscribing households have fewer program choices than subscribing households, broadcasters cannot reduce the viewer appeal of their programming to non-subscribing households, without also reducing the viewer appeal of their programming to subscribing households. Broadcasters deliver the same programming to both subscribing and non-subscribing households. Thus, the majority of households that subscribe to cable or DBS assure that non-subscribing households receive appealing programming.

145. Although viewers easily switch between the programming offered by broadcast television stations and the programming offered by cable networks, broadcast television stations and cable networks may respond differently to changes in local market concentration. Therefore, in formulating our revised local broadcast television ownership rules, we continue to draw a distinction between television broadcast stations and

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[286] The analytical approach of the *DOJ/FTC Merger Guidelines* "begins with a focus on consumers. Whether a proposed merger or acquisition is anticompetitive is determined in part by asking what alternatives are, or would be, available to customers in the event that prices increase-or service deteriorates." Fox Comments, Owen Statement at 2-3.

cable networks. Because cable networks typically offer national programming nationwide, they have incentives to respond to conditions in the national market. It is unlikely that mergers between broadcast television stations in any local market would alter the competitive strategy of a national cable network. In contrast, local broadcast television stations offer a mix of national programming and local programming in a geographic area typically no larger than a DMA. As such, local broadcast television stations have incentives to respond to conditions in local markets. It is the unilateral and coordinated responses of local broadcast television stations to mergers between local broadcast television stations that may result in potential competitive harms. Thus, we focus on ownership of television broadcast stations, not cable networks, to promote competition in local television markets.

(a) Geographic Market for DVP

146. As we evaluate the competitive effects of mergers between local broadcast television stations, we must define the relevant geographic market for the DVP market. Generally, cable systems carry all the broadcast stations assigned to the DMA in which they are located, pursuant to our must-carry/retransmission consent requirements.[287] Cable systems providing service to the majority of households also carry most major cable networks. As such, the relevant geographic market for DVP is the DMA for most mergers between local broadcast television stations.

(b) Efficiencies of Common Ownership of Television Broadcast Stations in DVP Markets

147. We recognize that common ownership of stations may result in consumer welfare enhancing efficiencies. First,

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[287] *See* 47 C.F.R. § 76.55(b)-(e) (defining local noncommercial educational television station, local commercial television station and television market for purposes of signal carriage obligations); 47 C.F.R. § 76.56 (signal carriage obligations).

common ownership of broadcast television stations in a local market can facilitate efficiencies and cost savings.[288] Joint operations can eliminate redundant studio and office space, equipment, and personnel, and increase opportunities for cross-promotion and counter-programming.[289] Our current rule hinders the realization of efficiencies by prohibiting common ownership of television stations in most DMAs. To enhance the ability of broadcast television to compete with cable and DBS in more DMAs, we believe that the potential efficiencies and cost savings of multiple station ownership should be available to stations in a larger number of DMAs than permitted by our current rule.[290]

148. Common ownership of broadcast television stations in a local market may also spur the transition to digital television. The DTV transition is a government-mandated undertaking designed to achieve several important goals, including: (1) the preservation of free, universally available local broadcast television in a digital world; and (2) the promotion of spectrum efficiency and the rapid recovery of spectrum for other uses.[291] In developing DTV build-out rules for broadcast stations, the Commission has recognized the particular financial challenges faced by stations in smaller markets.[292] Nevertheless, many

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[288] Randy Falco, President of NBC Television Network, argues that broadcasters have large sunk costs in programming and ownership of multiple stations at the local level enables broadcasters to amortize programming costs across more platforms. Bear Stearns Comments at 208-09.

[289] Sinclair Comments at 16, Exhibit 8 at 30-31.

[290] Alaska Comments at 3-4. Alaska contends that the current rule gives relief to large market broadcasters but denies the benefits of common ownership to small market broadcasters. *See also*, Granite Comments at 14; Gray Comments at 17; and Nexstar Comments at 20-22.

[291] *See, e.g., Advanced Television Systems and Their Impact Upon the Existing Broadcast Service*, 12 FCC Rcd 12809, 12811-12 ¶¶ 5-6 (1997) ("*Fifth Report and Order*").

[292] *See Review of the Commission's Rules and Policies Affecting the*

DTV construction costs do not vary with market size and thus it still may be relatively more difficult for stations in these markets to finance the transition to DTV.[293]

149. We believe that our modified rule, which permits the common ownership of at least two television stations in most markets, will have a beneficial impact on the DTV transition. One study shows that stations that are commonly owned and stations involved in joint operating arrangements are further along in the DTV transition.[294] Common ownership could facilitate cost savings by sharing DTV equipment (e.g., towers, production equipment) and engineering personnel. Common ownership would also allow the expertise gained in transitioning one station to DTV to be transferred to other commonly owned stations.

150. Our competition goal seeks to ensure that for each television market, numerous strong rivals are actively engaged in competition for viewing audiences. Although mergers among participants in the DVP market would not affect the number of delivered video program streams, they might adversely affect the types or characteristics of the programming offered by the merged entities to the detriment of viewers. Audience share data, however, reveals that common ownership of two broadcast television stations has generally improved audience ratings.[295] That is, the evidence we have for common

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Conversion to Digital Television, 16 FCC Rcd 20594 (2001) (permitting stations in markets beyond the top thirty markets initially to come on the air with lower-powered – and therefore less expensive – facilities, to operate at a reduced schedule, and to file for extensions of time to construct based on financial hardship); *Fifth Report and Order*, 12 FCC Rcd at 12842 ¶ 78 (adopting staggered construction schedule to help reduce costs for smaller market stations and permit them to learn from the experience of stations in larger markets).

[293] Media General *et al.* Comments at 5.

[294] Coalition Broadcasters Comments, Appendix B, *Study of DTV Rollout by Smaller Stations in Markets 51-100.*

[295] *Id.*, Attachment A: *Television Local Marketing Agreement and Local*

ownership of two television stations suggests that more viewers prefer the post-merger programming. We therefore conclude that our current rule, which prohibits common ownership of broadcast television stations in most markets, is overly restrictive. Because some relaxation of the current rule to permit additional consolidation in local television markets would facilitate efficiencies and likely result in the delivery of programming preferred by viewers, we conclude that our current rule cannot be justified on grounds of competition in the market for DVP.

(ii) Video Advertising Market

151. We conclude that the current rule is not necessary to promote competition in the video advertising market. We are concerned with competition in the broadcast television advertising market only to the extent that it adds an extra level of protection to viewers and enables broadcasters to compete for advertising revenue. We conclude that our local TV ownership rule restricts many broadcasters to suboptimal size and, therefore, hinders their ability to compete with other media for advertising revenue. That said, competitive broadcast television advertising markets may require a larger number of owners of DVP than are necessary to protect competition in the DVP market. As such, assuring competition in video advertising markets may provide the public with an added level of protection. A larger number of television station owners in a local television market may also lower the potential for the exercise of market power by any one broadcaster and, therefore, help smaller or non-consolidating broadcasters compete for advertising revenue.

Duopolies: Do They Generate New Competition and Diversity? Mark R. Fratrik, BIA Financial Network (Jan. 2003). Fratrik evaluated the performance of LMA or co-ownership operations involving LIN Television and Raycom Media, and other local television stations in seven markets and determined that in all markets, these arrangements led to significant increases in both audience share and advertising revenue.

152. We have determined that broadcast television advertising is a relevant product market. Advertisers differ in their ability to substitute between alternative media. Although some advertisers that use broadcast television stations may consider cable networks or the advertising time sold by local cable operators to be good substitutes, other advertisers may not consider these alternatives to be good substitutes.[296] In addition, most advertisers that use broadcast television stations do not consider radio, newspapers, and other non-video delivery media to be good substitutes.[297] We disagree with studies suggesting that broadcast television is not a relevant

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[296] David Barrett, President and Chief Executive Officer of Hearst-Argyle Television, Inc., argues that over-the-air television stations have the most popular programs and can aggregate the largest audience. When it comes to attracting advertisers, Mr. Barrett maintains that broadcast television stations have absolute advantages over niche boutique cable network offerings. Bear Stearns Comments at 26.

[297] MOWG Study No. 10, *On the Substitutability of Local Newspaper, Radio, and Television Advertising in Local Business Sales* by Anthony C. Bush (Sept. 2002) ("MOWG Study No. 10").(finding weak substitutability between local television and local radio and weak substitutability between local television and local newspapers); Fox Comments, Owen Statement at 12 (asserting that merger enforcement in the media has tended to focus on rather narrow advertising markets, that DOJ excludes television and newspaper advertising as alternatives to radio when considering the advertising market definition in radio station mergers, and that DOJ has similarly rejected television and radio advertising as alternatives for newspaper advertisers when considering newspaper mergers); IPI Comments, Appendix A (finding no responsiveness of local cable television advertising rates to changes in local broadcast television advertising rates). The findings of IPI's study suggest that cable may have market power over some local advertisers. IPI's study does not, however, address the issue of whether consolidation of broadcast television stations in a local market could have market power. *See also* Bear Stearns Comments at 88-89 (Jeff Smulyan, Chairman, Emmis Corporation asserts that the audience most targeted by advertisers (18 to 34 year-olds and 18 to 49-year olds) are not reading daily newspapers anymore, which gives broadcast television an advantage).

product market.[298] A critical failing of these studies is the assumption that any exercise of market power would result in a general and uniform price increase to all advertisers. These studies argue that a significant number of advertisers have good substitutes for broadcast television and could defeat a general and uniform price increase. These studies fail to recognize that media markets are characterized by repeated interaction that enables broadcasters to identify advertisers that have good substitutes for broadcast television and those that do not have good substitutes for broadcast television. With this information, the exercise of market power in broadcast television markets would result in targeted and non-uniform price increases to those advertisers that do not have good substitutes for broadcast television, without raising prices for those advertisers that do have good substitutes for broadcast television.[299]

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[298] Crandall contends that his results suggest that television broadcast is not its own product market. Sinclair Comments, Exhibit 1, *The Economic Impact of Providing Service to Multiple Local Broadcast Stations Within a Single Geographic Market*, Robert W. Crandall, at 23 ("Sinclair Comments, Crandall Statement"). Baumann and McAnneny contend that the relevant product market is broader than broadcast television advertising and includes cable television, radio, newspaper, outdoor, and direct mail. Sinclair Comments, Exhibit 8, *Analysis of the Competitive Effects of an LMA between WTTE-TB and WSYX-TV in Columbus, Ohio*, Michael G. Baumann and Joseph W. McAnneny (Aug. 28, 1997) at 20 ("Sinclair Comments, Baumann/McAnneny Statement").

[299] Sinclair Comments, Baumann/McAnneny Statement at 28-30. Baumann and McAnneny maintain that price discrimination is unlikely because: (1) broadcasters would have to make educated guesses to identify price-insensitive advertisers, (2) advertisers that consider broadcast television an essential outlet have an incentive to disguise their preferences, and (3) advertisers could use media buyers and advertising agency representatives that are able to compare rates and resist attempts to charge greatly disparate rates for similar spots. *Id.* Baumann and McAnneny do not explain how hiring an advertising agency prevents price discrimination. We are not persuaded. Broadcasters make repeated sales, have a keen understanding of the price-sensitivities of advertisers, and can identify advertisers that

153. Our experience suggests, however, that common ownership of two local broadcast television stations has produced efficiencies without facilitating the exercise of market power in the broadcast television advertising market. Two studies in the record evaluate the impact of consolidation on advertising prices. One study indicates that local broadcast advertising prices are not significantly higher for stations owned or operated by single entity.[300] Another study examines market structure in the Columbus, Ohio, DMA following a broadcast television local marketing agreement ("LMA")[301] combination in the market and concludes that the LMA is unlikely to result in any competitive harm to local advertisers.[302] The data for these studies were based on the common operation of two broadcast television stations in the same market. In light of this evidence, and evidence cited above that the current rule prohibits some consumer welfare enhancing combinations, we conclude that the current rule is overly restrictive and not necessary to protect competition in the broadcast television advertising market.

(iii) Video Program Production Market

154. We conclude that the current rule is not needed to protect competition in the video program production market. Broadcast television stations, along with TV networks, cable networks, program syndicators, and cable and DBS operators purchase or barter for video programming. The channel

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consider television an essential buy. We conclude that a broadcaster with market power could raise prices to these advertisers.

[300] Sinclair Comments, Crandall Statement at 27. Using data from Sinclair, Crandall performs an econometric analysis of 58 stations in 38 DMAs.

[301] An LMA or a time brokerage agreement is a type of contract that generally involves the sale by a licensee of discrete blocks of time to a broker that then supplies the programming to fill that time and sells the commercial spot advertisements that support the programming. *See Local TV Ownership Report and Order*, 14 FCC Rcd at 12958 ¶ 126; 47 C.F.R. § 73.3555, Note 2(j) (2002).

[302] Sinclair Comments, Baumann/McAnneny Statement at 2.

capacity of today's cable operators and DBS operators provides many more opportunities for sellers of existing and new video programming, compared with 20 years ago.[303] Many of the programs sold today are specifically targeted to the niche audiences available on cable networks. In addition, many video programs initially sold to TV networks migrate to cable networks, and a few programs initially sold to cable networks migrate to local broadcast television stations. Same-market combinations are only of concern to the few program syndicators that sell their programming directly to individual local television stations. These program syndicators would not consider sales to group owners of television stations in multiple markets, TV networks, and cable networks to be good substitutes for the sale of programming to individual stations. These program syndicators play one television broadcast station against another in the same market to sell their programming. By precluding common ownership of broadcast television stations in most markets, our current rule provides for more owners of television broadcast stations in most markets than are necessary to assure that program syndicators receive a fair price for their programming.[304] We conclude, therefore, that the current rule is not necessary to protect competition in the video program production market.

b. Localism

155. The adoption of the local TV ownership rule was not predicated on promoting localism. To the contrary, the Commission has previously recognized that relaxation of the rule was likely to promote localism. Specifically, we relaxed the local TV ownership rule in 1999 on grounds that local ownership combinations were likely to yield efficiencies that "can in turn lead to cost savings, which can lead to programming and other service benefits that enhance the public

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[303] *See supra* ¶¶ 106-128.

[304] The current rule ensures that there are at least eight independent owners in all markets with eight or more stations.

interest."[305] The primary evidence of "programming and service" benefits was anecdotal evidence of increases in the amount of local news and public affairs programming aired by stations participating in LMAs.[306]

156. The *Notice* requested comment on whether and how the local TV ownership rule affects localism.[307] We asked whether the rule affects the quantity or quality of local news and other programming of local interest produced and aired by local stations, and whether it affects the local selection of news content that is aired.[308] We sought empirical data on the impact that common ownership and operation has had on the production of local programming by stations involved in such combinations or arrangements, and data on the quality of such programming.[309] We also sought comment on the costs of producing local news and public affairs programming, and the relationship of our local TV ownership rule to the viability of such programming.[310] Below, we analyze the relationship of the current rule to our policy goal of promoting localism, and examine whether modification of the rule will advance this policy goal. We conclude that our current local TV ownership rule poses a potential threat to local programming, and that modification of the rule is likely to result in efficiencies that will better enable local television stations to acquire content desired by their local audiences.

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[305] *Local TV Ownership Report and Order*, 14 FCC Rcd at 12920 ¶ 34.

[306] *Id.* at 12921-22 ¶ 36, n.68. Most of the record evidence of the potential benefits was anecdotal and was presented by broadcasters based on their own experiences with LMAs.

[307] *Notice*, 17 FCC Rcd at 18535 ¶ 95.

[308] *Id.*

[309] *Id.* at 18535 ¶ 95-96.

[310] *Id.* at 18535 ¶ 97.

(i) Local Programming Quantity and Quality

157. Commenters advocating relaxation of the local TV ownership rule contend that if the current rule has any relationship to localism, it is to hinder the achievement of this policy goal.[311] According to these commenters, the current financial position of many television broadcasters and the high cost of producing local news and public affairs programming threatens existing local programming and precludes development of new programming.[312] These commenters contend that the current rule prohibits combinations that would result in efficiencies which would facilitate production of more local news and public affairs programming, or at least protect current local news operations.[313] In support of these arguments, commenters provide persuasive anecdotal and empirical evidence of how LMA and duopoly combinations have improved local coverage,[314] and some evidence of the rising costs of local news operations.[315]

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[311] Sinclair Comments at 29-31; Media General *et al.* Comments at 5; Duhamel Comments at 5-6. Several commenters state that our localism policy is unrelated to ownership rules. They contend that localism is an obligation of all broadcast licensees that is enforced through our licensing and license renewal processes. *See* Nexstar Comments at 18-20; Gray Comments at 16; Sinclair Comments at 30-31.

[312] Alaska Comments at 6; Belo Comments at 25; Coalition Broadcasters Comments at 4-7; Granite Comments at 6-7; Gray Comments at 16-18; NAB Comments at 75-77.

[313] Alaska Comments at 5-6; Coalition Broadcasters Comments at 4; Duhamel Comments at 6; Granite Comments at 7; Gray Comments at 15-16; Hearst-Argyle Comments at 8-9; Media General, *et al.* Comments at 5; NAB Comments at 78.

[314] Belo Comments at 22-24; Coalition Broadcasters Comments at 16-33; Fox Comments, Economic Study B, *Effect of Common Ownership or Operation on Television News Carriage, Quantity and Quality* ("*Fox News Study*"); Nexstar Comments at 2-6.

[315] NAB Comments, Attachment D, *Newsroom Budgets in Midsize and Small Markets*, prepared for NAB by Smith Geiger, LLC ("*NAB Newsroom Costs Study*"); NAB Comments, Attachment C, *The Declining Financial*

158. On the other hand, commenters opposing modification of the rule assert that concentration within local markets impedes localism, as evidenced by sharing of news resources and one case of reduced local news offerings following the establishment of a same-market television combination. Some of these commenters anticipate that modification of the local television ownership rule will lead to television programming that is less responsive to local needs based on their observations of how radio consolidation has affected local programming.[316] In support of their contentions, these commenters provide examples of how combinations have harmed local news and public affairs programming.[317] The few examples provided, however—especially those that are borrowed from the newspaper or radio contexts—do not persuade us that local combinations of television stations will harm localism.

(a) Empirical Evidence

159. An empirical study of the effects of common ownership or operation on local news quantity and quality provides some evidence that stations that are commonly owned or operated are more likely to offer local news than independently owned stations. The study submitted by Fox ("News Study") examined the news offerings of all full-power commercial

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Position of Television Stations in Small and Medium Markets ("NAB Comments, Small to Medium Markets Statement").

[316] AFL-CIO Comments at 27-30; AFTRA Comments at 12-14, 33-35; CFA Comments at 250-260; CWA Comments at 29, 32, 40-42; UCC Comments at 16, 51-52.

[317] Although they offered anecdotal evidence, commenters who urge us to retain the current rule did not provide empirical data concerning the effects of same-market local TV combinations on local news and public affairs programming. PEJ provided an empirical study that analyzed the effects on local news of the following factors: size of a station group (*i.e.*, across all markets), network affiliation, cross-ownership of other media, or ownership by an entity with corporate headquarters in the market. Thus, the study did not analyze the effects on local news of common ownership of more than one television station in a market.

television broadcast stations, comparing the quantity and quality of local news offerings of stations that are part of a commonly owned/operated pair with those of other stations.[318] The News Study found that stations that are part of a commonly owned local station group or LMA are significantly more likely to carry local news than other stations, even controlling for other factors. The study also found that the total minutes of local news carried by commonly owned or operated stations is similar to the total minutes of local news carried by other stations, as is the quality of the news programming as measured by the number of news awards the stations receive. The study considered whether stations that compete with same-market combinations increase or reduce the amount of local news they air in response to the presence of the same-market combination, and found that the presence of a combination had no statistically significant effect on the amount or quality of news programming available in the DMA, after controlling for other factors.[319]

(b) Anecdotal Evidence

160. Broadcasters provide persuasive anecdotal evidence in support of their claims that same-market combinations have resulted in efficiencies that produce public interest benefits. Belo states that its acquisition of a second station in the Seattle, Washington, DMA has resulted in an extra hour of news programming,[320] and has allowed Belo to devote more resources to public affairs programming.[321] Belo's second station in Spokane, Washington, recently began airing local news,[322] and a recently acquired second station in Tucson,

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[318] *Fox News Study* at 3.

[319] *Id.* at 2.

[320] Belo Comments at 22-23. The stations share news staff but have separate news producers.

[321] *Id.*

[322] *Id.* at 23. Although the news is co-produced with its duopoly pair, the station airs its news at a different time and has its own anchor and news

Arizona, will soon begin to air a local newscast.[323] Nexstar states that local news and public affairs programming has increased as a result of its LMAs in various markets,[324] including, for example, tripling the news coverage in Bloomington, Illinois, from one crew to three crews;[325] starting the market's only 9:00 PM newscast;[326] reinstating local sports programming;[327] and producing and airing a new local public affairs program.[328]

161. Coalition Broadcasters point to similar public interest benefits resulting from their same-market combinations.[329] At one station that is part of an LMA, efficiencies allowed for an increase in the number of employees devoted to producing news and the expansion of the station's local news from six hours per week in 1994 to 19.5 hours per week today.[330] Another station did not offer any regular local news or sports coverage and provided little other local program service prior to entering into an LMA, which later became a duopoly.[331] Today, the station broadcasts approximately 120 local university sports events annually, 60-second news briefs twice daily, five minute news briefs during university games, and a

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producer. *Id.*

[323] *Id.*

[324] Nexstar Comments at Appendix A (describing public interest benefits resulting from combinations in nine markets).

[325] *Id.* at A-1.

[326] *Id.* (describing changes resulting from an LMA in the Peoria-Bloomington, Illinois DMA).

[327] *Id.* (describing changes resulting from an LMA in the Joplin, Missouri-Pittsburg, Kansas DMA).

[328] *Id.* at A-2 (describing changes resulting from an LMA in the Wilkes Barre-Scranton, Pennsylvania DMA).

[329] Coalition Broadcasters Comments at 16-34 (describing public interest benefits resulting from seven combinations).

[330] *Id.* at 16 (describing an LMA in the Fort Myers-Naples, Florida DMA).

[331] *Id.* at 18 (describing a combination in the Honolulu, Hawaii DMA).

rebroadcast of the news of its LMA partner at a different hour.[332] The station also has aired 21 locally-produced evening specials over the past two years.[333] Operating independently, the local programming offerings of two UHF stations in Cleveland, Ohio, were scant – one hour of local news on one of the stations, and no local news on the other.[334] The stations then entered into an LMA and later became a duopoly.[335] Today, one station airs 7.5 hours of local news coverage every weekday, and the other offers one hour of news per day, as well as news breaks.[336] Fox reports that the 1999 relaxation of the local TV ownership rule allowed it to create nine combinations, which are airing an average of 6% more local news than before Fox acquired these stations.[337]

162. In support of their contention that relaxation of the local TV ownership rule has adversely affected localism, AFL-CIO and AFTRA state that "examples of the loss of local newscasts . . . as a result of media consolidation abound nationwide" but provide only three examples, two of which concern radio

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[332] *Id* at 18-20.

[333] *Id.*

[334] *Id.* at 21.

[335] *Id.*

[336] *Id.* Both stations have access to significantly improved resources and facilities for news production. Prior to the combination, the station offering news had seven videographers, 25 other staff, and a single news truck. Today, the stations boast a combined news division of 19 videographers, 73 other staff, four news trucks, sixteen cars, a helicopter, six ENG microwaves and five receive sites. *Id.* at 21-34 (describing similar public interest benefits resulting from combinations in several other markets); *See also* Statement of Edward Munson, Vice President and General Manager of WAVY(TV) and WVBT(TV) at FCC Field Hearing on Media Ownership, Feb. 27, 2002 ("LIN En Banc Statement") (describing similar public interest benefits resulting from a combination in the Richmond, Virginia DMA).

[337] Fox Comments, News Programming Exhibit 1 at 3-4. Fox states that in each case, it has owned the second station for 16 months or less. *Id.*

combinations.[338] Specifically, they state that Sinclair has announced plans to cease local production of weather reports at its two television broadcast stations in the Dayton, Ohio, DMA which now will air weather reports generated at Sinclair's Baltimore, Maryland, headquarters.[339] As these commenters recognize, Sinclair stations that are not part of combinations also will receive weather reports from corporate headquarters, so this evidence does not demonstrate that consolidation within local markets decreases local origination of weather reports or otherwise reduces local programming.[340] Rather, production of programming at a national headquarters appears to be motivated by the ability to achieve efficiencies unrelated to the number of stations Sinclair owns within a particular local market.[341] AFL-CIO and AFTRA also state that when Viacom acquired a second all-news radio station in Chicago, it shut down one of the stations, eliminating a source of local news.[342] Viacom refutes this claim, asserting that the station was not "shut down" but that its format was changed from all news to sports/talk in order to meet the desires of local audiences.[343] We do not agree that a change in format is the same as "shutting down" a station. We also do not agree that a single example of a radio station's format change can be extrapolated into a general statement about the effects of our existing local

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[338] AFL-CIO Comments at 47-49; AFTRA Comments ¶¶ 32-40.

[339] AFL-CIO Comments at 48; AFTRA Comments ¶¶ 32-40.

[340] Sinclair Reply Comments at 12 (as evidenced by its use of NewsCentral in markets in which it owns only one station, Sinclair's NewsCentral initiative has "nothing to do with duopoly").

[341] Sinclair states that its NewsCentral initiative, pursuant to which it produces news from a central location, is "intended to allow Sinclair to produce and broadcast news in a more efficient manner than is currently the case," and is not relevant to the instant proceeding. *Id.* at 6.

[342] AFL-CIO Comments at 48-49; AFTRA Comments ¶¶ 32-40.

[343] Viacom Reply Comments at 5-6.

TV rule, or a predictive statement about the likely result of modifying the rule.

163. UCC believes that the increased common ownership of stations in the same market has reduced the amount of local programming because co-owned stations consolidate staff and resources that produce local information.[344] UCC complains that, as a result of the 1999 relaxation of the local TV ownership rule, there are now at least 75 commonly owned station pairs and 20 station pairs that are part of LMAs.[345] UCC provides examples of two markets where commonly owned stations share resources,[346] and one market where a combination that once shared news resources ceased to produce local news entirely, relying on news produced by another station in the market.[347] The effects of same-market combinations on news production in just three markets are not a sufficient basis for a conclusion about the effects of some 95 same-market combinations on localism. Moreover, although the examples provided show that the subject stations no longer produce news independently, this does not necessarily translate into "less" local news.[348] The subject stations may now offer the same news at different times, which might actually expand the "amount" of news available to viewers in that market, if viewers previously unable to watch news programming can watch the news at a different time.[349] By combining resources,

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[344] UCC Comments at 39-40.

[345] *Id.*

[346] *Id.* at 40 (discussing the combined operations of two stations owned by Viacom in New York, New York and two stations owned by Fox in Los Angeles, California).

[347] *Id.* (describing a Detroit, Michigan combination owned by Viacom that now obtains news from a competitor).

[348] The production of local news by more owners relates to viewpoint diversity, not localism.

[349] According to Belo, broadcasters owning or operating same-market combinations have "strong economic incentives" to add news programming

the subject stations may also be offering more coverage of local events than before. UCC's anecdotal evidence does not address these factors.

(c) Conclusion

164. On balance, evidence presented by commenters concerning the amount and quality of local news and public affairs programming suggests that owners/operators of same-market combinations have the ability and incentive to offer more programming responsive to the needs and interests of their communities and that in many cases, that is what they do. Thus, modifications to the rule that will allow for greater common ownership are likely to advance our localism goal.

(ii) Effect of Local Market Consolidation on Local Control Over Content

165. Without linking their conclusions to a specific rule, AFL-CIO and AFTRA contend that media consolidation generally reduces local control over content and places greater control in the hands of the corporate headquarters of the entity that owns a given outlet.[350] They further state that by reducing the number of available employers at the local level, consolidation makes news professionals less likely to risk alienating their employers by challenging their demands.[351] In

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to commonly owned stations. At a minimum, such broadcasters would repurpose newscasts at staggered times to increase audience share, thereby bringing local audiences more viewing opportunities. Belo Comments at 24-25. Coalition Broadcasters assert that "even the limited consolidation achieved through existing LMAs and duopolies has enabled in-market stations to offer beneficial services such as local news and public affairs programming and other innovative services." *See* Coalition Broadcasters Comments at 6-7.

[350] AFL-CIO Comments at 51-53; AFTRA Comments ¶¶ 46-51.

[351] AFL-CIO Comments at 53; AFTRA Comments ¶ 52. They also cite a recent study showing that 41% of 300 reporters surveyed said that they had intentionally avoided newsworthy stories to benefit the corporate interests of their news organizations. AFL-CIO Comments at 52; AFTRA Comments ¶ 50 (citing Pew Research Center for People and the Press Survey (Apr. 30,

support of this, AFL-CIO and AFTRA cite their own experience in contract negotiations, which they contend are conducted by corporate, not local station representatives. They do not, however, provide any examples of negotiations, nor do they offer a comparison between negotiations with employers that own more than one station in a market and those that own single stations.[352] They state that because of a directive from a Disney CEO, the ABC network cancelled a story on Disney's hiring policies.[353] However, this example does not pertain to programming decisions of local stations, but to the programming decision of a national broadcast network. Such evidence may be relevant to whether there is a tie between ownership and the presentation of viewpoints, but does not establish a connection between local market structure and local control over content. Indeed, we have no record evidence linking relaxation of our local ownership rule to a reduction in local control over content.[354] We also have no means of measuring the extent to which news professionals' fear of retribution by their employers is reducing the ability of television broadcast stations to offer news focused on the needs and interests of their local communities, nor can we connect such concerns to our local ownership rules.

2002)). Again, such comments and findings help to establish a connection between viewpoint diversity and ownership, but they do not tell us whether the local TV ownership rule is in any way linked to journalists' reporting decisions. Commenters do not contend, nor does the cited survey find, that such results are any more or less likely in when there is greater local market concentration.

[352] AFL-CIO Comments at 51-52; AFTRA Comments ¶ 47.

[353] AFL-CIO Comments at 52; AFTRA Comments ¶ 48.

[354] Nexstar asserts that, contrary to the unsubstantiated claims of some commenters, they "actively mandate a local community focus for their stations." Nexstar Reply Comments at 6.

(iii) News Programming Costs and Viability of Local News Operations

166. Several commenters contend that the rising cost of producing news and public affairs programming is forcing broadcasters to reduce news production and that relaxation of the local TV ownership rule would allow broadcasters to invest in new local news and public affairs programming or at least to maintain existing programming.[355] Gray provides four examples of stations in smaller markets that have shut down or significantly scaled back their news operations due to financial concerns.[356]

167. NAB filed a study conducted by Smith Geiger, LLC ("Smith Geiger") examining the cost of the startup and operating costs of local news production for stations in small (ranked 101-210) and mid-sized (ranked 51-100) markets.[357] The study provides an average operating budget and the average startup costs for a small market station and for a mid-size market station, intended to reflect newsrooms that are neither "heavily invested" nor "financially starved."[358] The study finds that although equipment prices are dropping rapidly, rising demand for qualified personnel is increasing the amount stations must spend on salary and benefits.[359] Smith Geiger concludes that a startup news operation would not

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[355] Gray Comments at 17-19; Duhamel Comments at 5-6; Granite Comments at 6-7, 11-12; NAB Comments at 75-78; Nexstar Reply Comments at 11-12.

[356] Gray Comments at 18-19. Similarly, Granite contends that "local" news is not so local anymore because financial pressures have forced broadcasters to take cost-cutting measures such as filling local newscasts with regional and national feeds. Granite Comments at 7.

[357] *NAB Newsroom Costs Study*, *supra* note 318.

[358] To determine the costs, Smith Geiger states that it polled multiple stations in each market range, but it does not specify how many stations were polled, how the stations were selected, or its polling methodology. *Id.* at 2.

[359] *Id.*

"break even" until year 13 in a small market and year 14 in a mid-sized market.[360] The study concludes that in this climate, if a local station were to cease news operations, "it is difficult to imagine another entity stepping in to take its place."[361] Smith Geiger notes that although news operations earn a profit,[362] they require the parent company or station to carry a significant cost load and deal with other intangibles such as personnel management, liability, and community goodwill.[363] Smith Geiger concludes that this may lead local stations to exit the local news business in favor of lower cost alternatives, such as acquired programming, which it estimates will earn a higher profit in both small and mid-sized markets.[364] Smith Geiger ultimately concludes that "the continuing profitability of a local television news operation is now highly uncertain."[365] Many commenters agree.[366] NAB submitted an additional study which compares the average cost of producing news by affiliates of "Big Four" networks (*i.e.*, ABC, CBS, Fox, and NBC) in markets of various sizes.[367] These data show that the average news expense of affiliate stations has increased by as much as 104% between 1993 and 2001.[368]

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[360] *Id.* at 6, 11.

[361] *Id.* at 15.

[362] Smith Geiger finds that existing news operations in mid-sized markets earn a 40% profit margin, and that news operations in small markets earn a 30% profit margin. *Id.* at 13.

[363] *Id.*

[364] *Id.* at 13-15.

[365] *Id.* at 2.

[366] Alaska Comments at 5-6; Bear Stearns Comments at 5; Gray Comments at 16-19; Granite Comments at 12-14; NAB Comments at 75-78.

[367] NAB Comments, Small to Medium Markets Statement, *supra* note 318.

[368] *Id.* Specifically, the study shows that between 1993 and 2001, the average increase for stations in markets 51-75 was 71%; in markets 76-100, 104%; in markets 101-125, 58%; in markets 126-150, 56%; and in markets 151-175, 82%.

168. Smith Geiger does not provide detailed information on how it gathered its data, how many stations were sampled, or how the stations were selected. The study data may have been gathered from hundreds of stations or a mere handful. However, NAB's other study concerning the costs of producing news, which describes its methodology and surveys a broad range of stations, supports the conclusion that news costs are rising. Moreover, there is no contrary evidence in the record to suggest that the cost of producing news and public affairs programming is decreasing. We also recognize that certain factors, such as declines in network compensation[369] and the costs of transitioning to DTV,[370] are likely to place some broadcasters under financial pressures which could cause them to choose a less expensive option than producing their own local programming.

169. *Conclusion.* The current local TV ownership rule is not necessary in the public interest to promote localism. More likely, the current rule is hindering our efforts to promote localism. Anecdotal and empirical evidence in the record demonstrates post-combination increases in the amount of local news and public affairs programming offered by commonly owned stations. Moreover, rising news production costs and other factors may cause broadcasters to turn to less costly programming options. Having found that there is a positive correlation between same-market combinations and the offering of local news, we agree with NAB and others who contend that modifying the local TV rule is likely to yield efficiencies that will allow broadcasters to invest in new local news and public affairs programming, or at least to maintain existing local programming.

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[369] Alaska Comments at 5-6; Granite Comments at 12; NAB Comments at 74.

[370] Alaska Comments at 5-6; Bear Stearns En Banc Statement at 3; Gray Comments at 18; Granite Comments at 12; NAB Comments at 72-75. *See also* ¶¶ 148-149, *supra*.

c. Diversity

170. Section 202(h) requires that we consider whether the local TV ownership rule is necessary in the public interest to promote our diversity goal. Our current rule measures viewpoint diversity largely through its voice test, which ensures that all television markets have at least eight independent broadcast television voices. The *Sinclair* court remanded the Commission's decision in the *Local TV Ownership Report and Order* on grounds that we failed to adequately explain why only television broadcast stations are relevant to our diversity analysis for purposes of our local TV rule, when several other kinds of media were deemed relevant to our diversity analysis for purposes of other rules. Accordingly, we also sought comment on whether additional media should be considered in evaluating diversity in local television markets. The *Notice* also sought comment on the extent to which local television stations express viewpoints, and whether there is a connection between ownership and viewpoint.

171. As discussed in the Policy Goals Section, we find that, as we have previously held, multiple media owners are more likely to present divergent viewpoints.[371] Upon review of the record in this proceeding as well as our own analysis of local media markets, we find that media other than television broadcast stations contribute to viewpoint diversity in local markets. The data in the record indicate that the majority of markets have an abundance of viewpoint diversity. We conclude therefore that our existing local TV ownership rule is not necessary to achieve our diversity goal. In order to promote viewpoint diversity, we will rely on a combination of our cross media limits, discussed below at Section VI.D., as well as revised local television and local radio ownership caps.

172. Although our local TV ownership rule was not intended to promote program diversity, our *Notice* also sought comment

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[371] *See* Policy Goals, Section III, *supra*.

on the relationship between our local TV ownership rule and program diversity. We also conclude that the current rule is not necessary to promote program diversity.

(i) Viewpoint Diversity

173. Proponents of relaxing the rule contend that owners of television stations do not present their own viewpoints,[372] that each television station presents multiple viewpoints,[373] that a single owner of more than one television station in a market has greater economic incentives to present a broader diversity of viewpoints in order to attract more viewers,[374] and that under the current rule, television stations avoid presenting extreme views in order to avoid alienating viewers.[375] Several commenters contend that the current rule actually poses a threat to viewpoint diversity.[376] Duhamel asserts that in today's economic climate, if broadcasters cannot consolidate within

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[372] Belo Comments at 14-16, 17-19; Duhamel Comments at 7; Granite Comments at 10-11; Sinclair Comments at 50-52, Exhibit 24; Belo Reply Comments at 3-5.

[373] Granite contends that every station presents multiple viewpoints, citing, among other things, political broadcasting requirements that ensure that stations serve "as a megaphone for all candidates, not just those with whom the broadcaster agrees." Granite Comments at 10-11. *See also* Statement of Jay Ireland, President, NBC Stations at FCC Field Hearing on Media Ownership (Feb. 27, 2003)at 4 ("NBC En Banc Statement").

[374] Fox Comments at 51-52 (a single owner of multiple outlets has a greater incentive to provide viewpoint diversity than would multiple owners); NAB Comments at 32-35; Nexstar Comments at 8-9 (viewpoint diversity will not be reduced but increased, as demonstrated by the maintenance of separate news staffs and different news content by LMA combinations operated by Nexstar and Quorum); Paxson Comments at 7-8; 28 (market forces will promote diversity goals); Sinclair Comments at 26-28, Exhibit 16 (common ownership or operation has increased viewpoint diversity in some cases, as evidenced by certain Sinclair duopolies/LMAs).

[375] Granite Comments at 10-11; Belo Comments at 14-16.

[376] Duhamel Comments at 7. *See also* Coalition Broadcasters at 6 (combinations promote diversity by ensuring the viability of local broadcasters that might otherwise go dark).

local markets, stations will go dark, resulting in greatest possible harm to diversity.[377]

174. We recognize that a single media owner may elect to present a range of different perspectives on a particular political or social issue. It may also be accurate that, as several commenters contend, a single owner of multiple media outlets in a local market may have a greater incentive to appeal to more viewers by presenting more perspectives than do multiple owners of single outlets. Even if a single owner of multiple television stations in the same market has an enhanced ability and incentive to present a broader range of viewpoints, that single owner still retains "ultimate control over programming content, who is hired to make programming decisions, what news stories are covered, and how they are covered."[378] We conclude that we cannot rely exclusively on the economic incentives that may or may not be created by ownership of multiple television stations to ensure viewpoint diversity. However, as we discuss further below, because we find that other media contribute to viewpoint diversity in local markets, we conclude that our existing local TV ownership rule is not necessary to achieve our diversity goal.

175. *Contribution of Other Media to Viewpoint Diversity in Local Markets.* The local television ownership rule has traditionally focused only on the contribution of television broadcast stations to diversity in local markets. In the 1998 Biennial Review proceeding, the Commission sought comment on media substitutability, but was "unable to conclude from the record the extent to which other media serve as readily available substitutes for broadcast television." Lacking adequate factual information concerning the contribution of other media to competition and diversity in local markets, the

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[377] Duhamel Comments at 7.

[378] UCC Comments at 3-4. *See also* CWA Comments at 28-32, 42-45.

Commission established a voice test that included only full power television broadcast stations.

176. The *Notice* sought comment on whether, and if so how, to apply a voice test as part of our local television ownership rule. The *Notice* asked whether additional media such as radio stations, daily newspapers, cable systems, DBS, and DARS should count towards any voice test adopted as part of a local TV ownership rule.[379] Stated differently, the *Notice* sought comment on what media contribute to viewpoint diversity in local markets. Based on the evidence in the record, including our own evaluation of the media marketplace, we find that media outlets other than television stations contribute significantly to viewpoint diversity in local markets, and that our current rule fails to account for this diversity.

177. All of the commenters proposing modification or elimination of the local TV ownership rule argue that there is today an abundance of viewpoint diversity, and that even if the local TV ownership rule is relaxed or eliminated, the market will ensure continued availability of viewpoint and other types of diversity.[380] These commenters contend that, given current levels of diversity in local markets, the Commission cannot justify its current local TV ownership rule on diversity grounds.[381] Commenters further assert that the current rule inappropriately and incorrectly focuses only on television voices, when other media voices clearly contribute to diversity

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[379] *Notice*, 17 FCC Rcd at 18528-29 ¶ 77.

[380] Nexstar Comments at 6-13; Paxson Comments at 28 (asserting that the market and public demand has produced a great diversity of voices, and there is no incentive for large station group owners to "descend upon communities and extinguish the diversity," nor any evidence of an ability or intention to do so); Gray Reply Comments at 4-5; Paxson Reply Comments at 3; NBC En Banc Statement at 4.

[381] Alaska Comments at 4-5; Belo Comments at 21-22; Duhamel Comments at 6-7; Fox Comments at 44-47; Granite Comments at 10-11; Gray Comments at 14-15; NAB Comments at 35-39, 44; Nexstar Comments at 8-9; Paxson Comments at 27-30; Sinclair Comments at 22-25.

in local markets.[382] Commenters also state that programming other than local news may contribute to viewpoint diversity, and that such programming should be considered in measuring viewpoint diversity.[383]

178. We agree that television broadcast stations are not the only media outlets contributing to viewpoint diversity in local markets. The market for viewpoint and the expression of ideas is, therefore, much broader than the economic markets, defined above, in which broadcast stations compete. In particular, in focusing on the delivered video market alone, we would ignore countless other sources of news and information available to the public.[384] As a corollary, however, limits imposed on

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[382] Alaska Comments at 4-5; Belo Comments at 19-22 (daily newspapers, news/talk radio stations, cable news and public affairs programming, weekly newspapers and magazines, and Internet sources contribute to viewpoint diversity even more than television stations); Emmis Comments at 26-30; Fox Comments at 6-10, 50; Gray Comments at 14-15 (viewpoint diversity is guaranteed by availability of news and information from numerous radio and television stations, hundreds of video programming services, MVPDs, daily and weekly newspapers, thousands of periodicals, millions of web sites, and wireless data services); NAB Comments at 32; Pappas Comments at 15; Paxson Comments at 27-28; Sinclair Comments at 25-28. Gray counts low power television ("LPTV") stations among the voices contributing to diversity in markets served by its stations. Gray Comments at 10-13. *See also* IPI Comments at 19-20, 24-27 (urging us to consider the role of LPTV stations because LPTV stations may serve as substitutes for other local media for certain consumers and advertisers); Louisville Communications Reply Comments at 2-6; at 2. *See* Letter from Howard M. Liberman, Drinker Biddle & Reath, counsel for Nexstar, to Marlene H. Dortch, Secretary, FCC (May 16, 2003) at 2-3 ("Nexstar May 16, 2003 Ex Parte").

[383] Fox Comments at 50-51. *See also* Sinclair Comments at 21, 34-38 (if viewpoint diversity means something more than local news, the Commission also should factor in all programming that contributes to an awareness of political and social issues, including national news, non-traditional news, and certain entertainment programming); *but see* NAB Comments at 39-40 (most television and radio programming is entertainment-oriented and does present viewpoints).

[384] *See* MOWG Study No. 8, *Consumer Survey on Media Usage* by Nielsen Media Research (Sept. 2002) ("MOWG Study No. 8").

television station combinations designed to protect competition in local delivered video markets necessarily also protect diversity; indeed they are more protective of competition in the broader marketplace of ideas given the difference in market definition.

179. We do not, therefore, necessarily disagree with those who maintain that a local television ownership cap can help to protect the public's First Amendment interest in a robust marketplace of ideas.[385] We disagree, however, to the extent that they advocate a diversity-based rule that looks to broadcast-only television voices.[386] Accepting this narrowly-defined view would result in a rule that is overly restrictive both for competition and diversity purposes, because it would fail to include other participants in some relevant product markets and in the marketplace of ideas. Such an approach cannot be squared with our statutory mandate under section 202(h) or our desire to minimize the impact of our rules on the rights of speakers to disseminate messages.

180. Accordingly, by setting our local television ownership caps only so high as necessary to protect competition in the delivered video market, we will achieve necessary protection for diversity purposes without unduly limiting speech. As set

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[385] AFL-CIO Comments at 3-4; CFA Comments at 54-55; UCC Comments at 2-3; Children Now Comments at 24-28.

[386] Several commenters assert that evaluating broadcast-only voices is appropriate because other media are not effective substitutes for television. CFA Comments at 176-77; CWA Comments at 8-13; UCC Comments at 29-35; Children Now Comments at 9-12. Specifically, they contend that television broadcast stations remain the public's primary source of local news and public affairs programming, and that other media contribute little or nothing to viewpoint diversity in local markets. *See* UCC Comments at 29-35; Children Now Comments; IPI Comments at 22. They also contend that free over-the-air television is the only source of any video programming for a significant portion of the U.S. population. UCC Comments at 29, 32; Children Now Comments at 9; Smith Comments at 3; IPI Comments at 23-24.

forth above, our current rule is not necessary to protect competition and, indeed, may be harming competition in the delivered video market. It likewise cannot be justified on diversity grounds as it is overly restrictive. Our modifications to the rule, discussed below, remedy that failing.

(ii) Program Diversity

181. The local TV ownership rule has not traditionally been justified on program diversity grounds. However, the *Notice* sought comment on whether common ownership of multiple stations promotes program diversity, and if so, how this affects the need for the current local TV ownership rule. Commenters supporting relaxation or elimination of the local TV ownership rule assert that a single owner of multiple television stations has an enhanced incentive and ability to offer more diverse programming.[387] Entravision, which does not take a position on whether the rule should be modified, agrees that same-market combinations give owners an incentive to increase program diversity by reaching out to minority/niche audiences, but is concerned that entities owning more than one station in a market will engage in anticompetitive conduct that will endanger smaller broadcasters already serving niche audiences.[388] Entravision predicts that ultimately, abuse of

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[387] Duhamel Comments at 7 (an owner with two or more stations has a greater incentive to diversify its programming to attract new demographics); Entravision Comments at 5-6 (local duopolies have found that it is more profitable not to duplicate formats, but to "reprogram" one station to target underserved audiences); Fox Comments at 51-52; NAB Comments at 36-37; Nexstar Comments at 11-12; Paxson Comments at 13-14; Paxson Reply Comments at 5. Coalition Broadcasters filed a study comparing the pre-and post-combination advertising revenue and audience shares of their stations in LMAs and duopolies. Coalition Broadcasters Comments at 7, Attachment A. The study concludes that the combinations result in an average audience share increase of 3.2 points and an average advertising revenue increase of 250.7%. *Id.* Coalition Broadcasters believe that, by strengthening their appeal to their local communities and becoming more financially viable, these stations are increasing diversity within their respective markets. *Id.*

[388] Entravision Comments at 5-6.

market power by "consolidated broadcasters" may drive smaller broadcasters out of business, resulting in a mere substitution of programming for minority/niche audiences, rather than actually increasing program diversity.[389] Children Now asserts the diversity of children's programming will be harmed by an increase in same-market combinations, because local broadcasters will repurpose children's programming, resulting in less original programming for children.[390] Children Now urges us to retain the local TV ownership rule to ensure that a single owner of multiple television stations in a market does not offer the exact same programming to children as a means of meeting our children's programming requirements.[391] Alternatively, Children Now urges us to clarify that the use of same programming on multiple commonly owned stations in the same market does not satisfy our children's programming requirements.[392]

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[389] *Id.*

[390] Children Now Comments at 13-17. *See also* UCC Comments at 28 (contending that newspaper-broadcast cross-ownership will result in re-purposing of local news); AFL-CIO at 49-50; AFTRA Comments ¶¶ 42-43 (asserting that media concentration in general causes media outlets to obtain and repurpose material from competitors).

[391] Children Now Comments at 16-17; *Big Media, Little Kids: Media Consolidation and Children's Television Programming, A Report by Children Now* (May 21, 2003) at 2, 5-6, 9 ("*Children Now Report*") (finding that, in the Los Angeles, California DMA, that the number of hours of children's programming aired by television broadcast stations decreased by more than 50% between 1998 and 2003, and that the largest decreases in programming hours occurred at commonly owned stations); *but see*, Letter from John C. Quale, Skadden, Arps, Slate, Meagher & Flom, counsel for Fox, to Marlene H. Dortch, Secretary, FCC (May 28, 2003) ("Fox May 28, 2003 Ex Parte") (disputing findings in the *Children Now Report* with respect to television station combinations in the Los Angeles DMA and urging the Commission not to rely on such findings).

[392] *Children Now Report* at 9.

182. We find that modification of the current local TV ownership rule may enhance program diversity. As we explained in our discussion of policy goals (Section III(A)(2), *supra*), program diversity is best achieved by reliance on competition among delivery systems rather than by government regulation. Our local TV ownership rule will ensure robust competition in local DVP markets. As long as these markets remain competitive, we expect program diversity to be achieved through media companies' responses to consumer preferences. Nothing in the record seriously calls that conclusion into question.

183. We share the concern of Children Now that the diversity of children's educational and informational programming could be reduced if commonly owned stations in the same market air the same children's programming. A primary purpose of the Children's Television Act of 1990 was to increase the amount of educational and informational programming available to children.[393] It would be inconsistent with this Congressional objective to permit commonly owned stations in a market to rely on the same programming to meet the obligations set forth in Section 73.671 of our rules.[394] We therefore clarify that where two or more stations in a market are commonly owned and air the same children's educational and informational program, only one of the stations may count the program toward the three-hour processing guideline set forth in Section 73.671.[395]

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[393] Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. §§ 303a, 303b, 394. The Children's Television Act of 1990 and our related rules are premised on the notion that market forces are insufficient to ensure adequate levels of children's programming. *See* S. Rep. No. 227, 101st Cong., 1st Sess. at 9 (1989); *Policies and Rules Concerning Children's Programming*, 11 FCC Rcd 10660, 10676 ¶ 34 (1995).

[394] *See* 47 C.F.R. §73.761.

[395] Under the Section 73.671 processing guidelines, a broadcaster can

184. Commenters supporting retention of the current local TV ownership rule focus primarily on the importance of the rule to viewpoint diversity, not other forms of diversity. For example, CFA urges the Commission not to focus on protecting the diversity of entertainment programming, but on the diversity of news and information programming, which it ties to the number of owners, not to types of programming.[396] Although our modifications to the local TV ownership rule may result in increased program diversity, we are not prioritizing program diversity over viewpoint diversity. Rather, we are revising our entire local television ownership framework to reflect the contribution of other media to competition and viewpoint diversity in local television markets. As an added benefit, today's changes to the local TV ownership rule will allow market forces to yield greater program diversity.

2. Modification of the Local Television Ownership Rule

185. Based on our section 202(h) determination that the current local TV rule is no longer necessary in the public interest to promote competition and diversity, as well as our

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receive staff-level approval of its renewal application by airing at least three hours per week of programming that satisfies the criteria of programming specifically designed to serve the educational and informational needs of children ("core programming"). 47 C.F.R. § 73.671 Note 2. Alternatively, a broadcaster can receive staff-level renewal by showing that it has aired a package of different types of educational and informational programming that, while containing somewhat less than three hours per week of core programming, demonstrates a level of commitment to educating and informing children that is at least equivalent to airing three hours per week of core programming. In this regard, specials, PSAs, short-form programs, and regularly scheduled non-weekly programs with a significant purpose of educating and informing children can count toward the three-hour processing guideline. Licensees not meeting these criteria will have their license renewal applications referred to the Commission.

[396] CFA Comments at 176 (asserting that the debate over media ownership "is about news and information for citizens as listeners and speakers, not about entertainment outlets.").

finding that the current rule may hinder achievement of our localism policy goal, we must either eliminate or modify our local TV ownership restrictions. As we will explain further below, we conclude that elimination of the rule would result in harm to competition in local DVP markets, thereby harming the public interest. Elimination of the rule also would adversely affect competition in the advertising and program production markets. Accordingly, we modify the rule.

186. Our modified local TV ownership rule will allow ownership combinations that satisfy a two-part test: a numerical outlet cap and a top four-ranked standard. Our outlet cap will allow common ownership of no more than two television stations in markets with 17 or fewer television stations; and up to three stations in markets with 18 or more television stations. In counting television stations for purposes of this outlet cap, we will include all full-power[397] commercial and noncommercial[398] television broadcast stations assigned by

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[397] For purposes of counting the television broadcast stations in the market, we will include only full power authorizations. Thus, contrary to the suggestions of some commenters, we will not include Class A TV, LPTV stations or TV translators. *See* IFI Comments at 19-20, 24-27; Louisville Reply Comments at 2-6; at 2; Nexstar May 16, 2003 Ex Parte at 2. LPTV stations typically reach only a small portion of any given DMA, even in the few cases where they are carried by cable systems. Thus, the stations do not compete with DVP market participants on a DMA-wide basis, which we have held is the relevant geographic market. We also will exclude from our count any non-operational or dark stations. Newly constructed television stations that have commenced broadcast operations pursuant to program test authority also will be included in the DMA count. Television satellite stations will be excluded from our count of full power television stations in the DMA where the satellite and parent stations are both assigned by Nielsen to the same DMA. A satellite station assigned to DMA different from that of its parent, however, will be included in the TV station count for that DMA. DTV stations will be included in our count only if they are operating and are not paired with an analog station in the market.

[398] Our current local TV multiple ownership rule does not restrict the number of noncommercial television stations that can be owned by one entity. Consistent with past practice, our modified rule also will not affect

Nielsen to a given DMA.[399] Our top four-ranked standard will prohibit combinations which would result in a single entity owning more than one station that is ranked among the top four stations in the market based on audience share. Hence, same-market combinations will not be permitted in markets with fewer than five television stations. For purposes of applying our top four-ranked standard, a station's rank will be determined using the station's most recent all-day audience share, as measured by Nielsen or by any comparable professional and accepted rating service, at the time an application for transfer or assignment of license is filed, the same method as under our current rule.

187. The contour overlap provision of the rule will be eliminated, and the modified rule will be applied without regard to Grade B contour overlap among stations. Thus, if two stations in a market do not have overlapping contours, they still cannot be combined unless there are five or more stations in the market and at least one station in the combination is not among the top four. We have determined that, because of mandatory carriage requirements, the DMA – not the area within a particular station's Grade B contour—is the geographic market

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ownership of noncommercial television stations. Our decision to include noncommercial television stations in the TV station count also is consistent with our past practice and with the fact that noncommercial stations compete for viewers in local markets. See 47 C.F.R. § 73.3555(b)(2)(ii) (including noncommercial stations in the count for purposes of the eight-voices test under current local TV rule).

[399] There are a few instances in which a station's community of license is physically located in one DMA, but the station is assigned by Nielsen to a different DMA. We clarify that for purposes of our local TV ownership rule, a station will be considered to be "within" a given DMA if it is assigned to that DMA by Nielsen, even if that station's community of license is physically located outside the DMA. In addition, we recognize that certain geographic areas (specifically, Puerto Rico, Guam, and the U.S. Virgin Islands) are not assigned a DMA by Nielsen. For purposes of our local TV ownership rule, Puerto Rico, Guam, and the U.S. Virgin Islands each will be considered a single market.

in which DVP providers compete. Therefore, permitting station combinations solely on grounds that they do not have overlapping contours would be inconsistent with our market definition. As we explained above, the majority of viewers—including those who reside in geographically large DMAs—have access to television broadcast stations that they could not view over-the-air because they can view the stations via cable. Increasingly, local stations also are available via DBS. To avoid imposing an unfair hardship on parties that currently own combinations that do not comply with the modified rule, we will grandfather existing combinations, as discussed further below. In addition, because our assumption regarding DMA-wide carriage is not universally true, and in recognition of the signal propagation limitations of UHF signals, we adopt herein a waiver standard that will permit common ownership of stations where a waiver applicant can show that the stations have no Grade B overlap and that the stations are not carried by any MVPD to the same geographic area.

188. The public is best served when numerous rivals compete for viewing audiences. In the DVP market, rivals profit by attracting new audiences and by attracting existing audiences away from competitors' programs. The additional incentives facing competitive rivals are more likely to improve program quality and create programming preferred by existing viewers.[480] Below, we discuss how our analysis of competition in local DVP markets supports the modified rule.

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[480] For a discussion of program provision under different market structures, *see*, Peter Steiner, *Program Patterns and Preferences and the Workability of Competition in Radio* Broadcasting, 66(2) Q. J. ECON 194-223 (1952); MOWG Study No. 6, A Theory of Broadcast Media Concentration and Commercial Advertising by Brendan C. Cunningham and Peter J. Alexander (Sept. 2002) at 3-5 ("MOWG Study No. 6"); and Sinclair Comments, Baumann/McAnneny Statement at 2-6.

a. Evaluating Potential Competitive Harms Within Local DVP Markets.

189. Consistent with our competition policy goal, our local television ownership rule seeks to preserve a healthy level of competition in the market for DVP. The state of competition in this market affects the quality and diversity of programming content and therefore the overall welfare of DVP viewers. In formulating our local TV multiple ownership rule, we must assess the nature of this competition and weigh the potential benefits and anticompetitive harms that may arise from the increase in market concentration that results from a single firm owning multiple broadcast stations in a market.

190. There are two potential competitive harms that may be caused by a single firm owning multiple television stations in a market. First, ownership of multiple stations may result in "unilateral effects," *i.e.*, the firm acquiring multiple licenses may find it profitable to alter its competitive behavior unilaterally to the detriment of viewers. An example of such an effect would be the decision to cancel local news programming on one of the commonly-owned channels. Second, the acquisition of multiple licenses in a local market by a single firm may lead to "coordinated effects." That is, the increase in concentration may induce a joint change in competitive behavior of all the market participants in a manner that harms viewers.

191. We recognize the importance of competition from cable networks in the market for DVP. Indeed, viewing of cable network programming now accounts for approximately half of all television viewership.[401] Nevertheless, in formulating our revised ownership rules, we continue to draw a distinction between television broadcast stations and non-broadcast DVP

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[401] In June 2002, cable networks for the first time collectively exceeded a 50% share for the month (54% primetime share), while the broadcast networks collectively registered a 38% primetime share. *See* Romano, *supra* note 251 at 12.

outlets. This is because television broadcast stations and cable programming networks have different incentives to react to a change in local market concentration, which suggest differing levels of unilateral and coordinated effects. In particular, cable networks are almost exclusively offering national or broadly defined regional programming. Therefore, the profit-maximizing decisions of a national cable programmer reflect conditions in the national market. It is improbable that a change in concentration in any single local market would affect the competitive strategy of a national cable network. In contrast, we need to consider the possible competitive responses from other DVP outlets in local markets, which are almost exclusively television broadcast stations. Because of the differing footprints of cable networks and television broadcast stations, any possible competitive harms are more likely to arise from changes in the behavior of stations. Thus, our rules to promote local television competition are focused on ownership of television broadcast stations.

b. Welfare Enhancing Mergers in Local Delivered Video Markets.

192. The standard approach to evaluating the competitive harms of an increase in horizontal market concentration is outlined in the DOJ/FTC Merger Guidelines. The DOJ/FTC Merger Guidelines recognize the HHI level of 1800 as the maximum level of "moderate concentration."[402] We choose this threshold rather than the lower limit of 1000 because we recognize the competitive pressures exerted by the cable networks. The 1800 threshold corresponds to having six equal-sized competitors in a given market. The DOJ/FTC Merger Guidelines however, are written not for a specific industry, but rather as guidelines intended for application across all industries. Our rules are formulated for a specific market—the delivery of video programming—and are based on an extensive record on the extent of competition in this market and the effect

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[402] *DOJ/FTC Merger Guidelines* § 1.51.

of our current local TV ownership rule. This record allows us to craft a more finely-tuned rule for this industry.

193. First, the nature of the DVP market is such that there is constant product innovation with new program choices each season. In such a market, a firm's market share is more fluid and subject to change than in other industries. Hence a firm's "capacity" to deliver programming can be as important a factor in measuring the competitive structure of the market as is its current market share. Second, as each broadcast station requires a license, the number of licenses that a firm controls in a market is the measure of its capacity to deliver programming. Therefore, as a starting point, a simple application of the *DOJ/FTC Merger Guidelines* six-firm threshold suggests that, a single firm holding three licenses in a market with 18 or more licenses, or a firm holding two licenses in a market with 12 or more licenses, would not raise competitive concerns. However, as explained below, given the structure of the DVP market, a strict, overly simplistic application of the *DOJ/FTC Merger Guidelines* would potentially prohibit some welfare enhancing mergers and allow some anticompetitive mergers.

194. Ownership of multiple stations can lead to significant efficiencies. The record demonstrates, for example, that same-market combinations have resulted in an increase in viewership of the lower-ranked of the two stations in the combination, evidencing a welfare enhancing effect for consumers.[403] The possibility of welfare enhancing mergers has long been recognized in economics and antitrust literature. For example, the work of McAfee and Williams demonstrates that strict application of the *DOJ/FTC Merger Guidelines* would disallow some welfare enhancing mergers.[404] McAfee and Williams

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[403] Coalition Broadcasters Comments at Attachment A; *Owen Media Ownership Statement*. Of course the opportunity cost of viewership is that time could be spent on some other activity, thus an increase in viewership demonstrates an increase in the public's overall value of the programming.

[404] R. Preston McAfee and Michael Williams, *Horizontal Mergers and*

present a model in which, after a merger of independently owned production facilities, the merged firm will run the two facilities to jointly maximize its profits. McAfee and Williams find that mergers that do not create a new largest firm are welfare enhancing. A similar conclusion is found in the work of Froeb, Werden, and Tardiff ("Froeb *et al.*").[405] In their research, which considers mergers in the context of competition by firms producing differentiated products, Froeb *et al.* find that mergers among smaller firms tend to be welfare enhancing, and that mergers that do not create a significant increase in the market share of the largest firm pose little risk of competitive harm. By contrast, the research of Froeb *et al.* demonstrates that a merger of the second and third largest firms, which would significantly overtake the largest firm in size, would create welfare harms.

195. These results are particularly relevant to competition within local markets for DVP. Each broadcast station tends to deliver a differentiated product, and we have evidence of efficiencies from the ownership of multiple stations in a market. Moreover, in local markets, there is a general separation between the audience shares of the top four-ranked stations and the audience shares of other stations in the market.[406] A review of the audience shares of stations in every market with five or more commercial television stations (*i.e.*, 120 markets) indicates that in two-thirds of the markets, the fourth-ranked station was at least two percentage points ahead of the fifth-

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Antitrust Policy, XL J. INDUS. ECON 181-87 (June 1992).

[405] Luke M. Froeb, Gregory J. Werden and Timothy J. Tardiff, *The Demsetz Postulate and the Effect of Mergers in Differentiated Product Industries*, Working Paper EAG 93-5 Economic Analysis Group, Antitrust Division, U.S. Department of Justice (Aug. 1993). *See also* Gregory Werden and Luke M. Froeb, *The Effects of Mergers in Differentiated Products Industries: Logit Demand and Merger Policy*, 10(2) J. L. ECON ORG. 407-16 (1994).

[406] *See* BIA Media Access Database (Mar. 18, 2003).

ranked station.[407] Two percentage points represents a significant difference in audience share because for a station to jump from, for example, an eight share to a ten share, it would have to increase its audience share by 25%. Thus, although the audience share rank of the top four-ranked stations is subject to change and the top four sometimes swap positions with each other, a cushion of audience share percentage points separates the top four and the remaining stations, providing some stability among the top four-ranked firms in the market. Nationally, the Big Four networks each garner a season to date prime time audience share of between ten and 13 percent, while the fifth and sixth ranked networks each earn a four percent share.[408] While there is variation in audience shares within local markets, these national audience statistics are generally reflected in the local market station rankings. The gap between the fourth-ranked national network and the fifth-ranked national network represents a 60% drop in audience share (from a ten share to a four share), a significant breakpoint upon which we base our rule.

196. Other persuasive evidence of a separation between top four-ranked stations and other stations includes a study comparing audience shares of stations in ten markets of various sizes.[409] The study finds that the top four-ranked stations

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[407] IPI contends that the use of audience share rank as a metric in evaluating local ownership is "problematic" because ranks vary from quarter to quarter. IPI Comments at 19. In support of this, IPI cites data showing that, over an 18-month period, three different stations occupied the fourth-ranked position in the Los Angeles, California DMA. *Id.* As we explain above, our review of BIA data in over 120 DMAs shows that in over two-thirds of these markets, at least two percentage points separate the fourth and fifth ranked stations. In light of this evidence gathered from our review of a broad range of DMAs, we do not agree that data from a single DMA should dictate whether we rely on audience share rank as a metric for purposes of our local TV ownership rule.

[408] *Nielsen Ratings*, BROADCASTING & CABLE (May 26, 2003) at 11.

[409] *See* UCC Comments in MM Docket No. 01-235 at Attachment 3. UCC

control a combined total of at least 75% of each market's audience share.[410] Mergers of stations owned by any of these top four firms would thus often result in a single firm with a significantly larger market share than the others. Our analysis of the top four local stations is related to our analysis of the four leading broadcast networks in connection with the dual network rule. There we conclude that Big Four networks continue to comprise a "strategic group" within the national television advertising market. That is due largely to those networks' continued ability to attract mass audiences. It is this network programming that explains a significant portion of continued market leadership of the top four local stations in virtually all local markets. Thus the continued need for the Dual Network rule to protect competition at the network level also supports our decision to separate ownership of local stations carrying the programming of Big Four networks.[411]

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conducted a study of ten local television markets of various sizes. The UCC study found that in all markets, including the two largest television markets (New York, New York and Los Angeles, California), the top four-ranked television stations control more than 75 percent of the market, measured by viewership over the twelve-month period. In four of the markets, the top four stations had more than 90 percent of the market, and in three markets, the top four stations had 100 percent of the market. *Id.*

[410] *Id.*

[411] The local television ownership rule is consistent with a key aspect of our national television ownership rule in recognizing competitive disparities among stations. Our national television ownership cap recognizes competitive disparities between stations through use of the UHF discount, while our local television ownership cap recognizes competitive disparities between stations by prohibiting mergers of the top four-ranked stations in a market. The national ownership rule is an audience reach limitation, so it makes sense to adjust that limitation based on the diminished coverage of UHF stations. The local ownership rule, on the other hand, places a limitation on the number of stations that one entity may own in a market. Thus, that rule limits mergers of the top four-ranked stations in a market. Furthermore, in the local television ownership rule, we take account of a station's UHF status in considering certain waiver requests, as discussed

197. Permitting mergers among top four-ranked stations also would generally lead to large increases in the HHI. Although we believe that mechanical application of the *DOJ/FTC Merger Guidelines* may provide misleading answers to competitive issues in the context of local broadcast transactions, as a general matter, sufficiently large HHIs establish a *prima facie* case in antitrust suits.[412] Commenters who urge us to permit more same-market combinations focus primarily on the efficiencies and public interest benefits associated with a financially strong station merging with a financially weak station.[413] Such mergers are unlikely to create or enhance market power or to facilitate its exercise. In contrast, no commenter discussed the efficiencies and public interest benefits associated with a merger between two financially strong stations. Nothing in the record indicates that such mergers will produce efficiencies that translate into benefits for the viewing public. To the contrary, such mergers are likely to

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further below. Finally, we note that the top-four merger restriction in our local television ownership rule and the UHF discount in our national television ownership rule, while analogous, are not identical and do not serve exactly the same purpose. The UHF discount is premised, in part, on promoting the development of new and emerging networks. This rationale does not apply in the local television ownership context because ownership of multiple stations in a market does not promote development of new networks. The top-four limitation in the local television ownership rule, in contrast, is premised on competition theory, which is not the basis for the national television ownership rule.

[412] *FTC v. Heinz*, 246 F.3d 708, 716 (D.C. Cir. 2001).

[413] NAB proposes a local television ownership rule "that would provide needed financial relief for lower-rated stations (which are particularly struggling financially)." NAB Comments at 70. Coalition Broadcasters provide examples of joint operations involving at least one weak station, with little, or no, local news, and argue that these combinations make it possible for "those struggling stations to survive." Coalition Broadcasters at 15 – 33, and Attachment A at 1. Nexstar argues that without joint operation, many stations in small and mid-sized markets will not survive. Nexstar May 16, 2003 Ex Parte at 1.

create or enhance market power or to facilitate its exercise. Therefore, by allowing firms to own multiple stations, but prohibiting combinations among the top four-ranked stations, we enable the market to realize efficiency gains and improve the quality of product in the video programming market while mitigating the risk of harmful coordinated or unilateral competitive harms.

198. One reason that combinations involving top four-ranked stations are less likely to yield public interest benefits such as new or expanded local news programming is that such stations generally are already originating local news. Some commenters contend that the Commission has never demonstrated that top four-ranked stations are generally the market's news providers. Yet the data provided by some of these very commenters confirms that this is the case. In support of its contention that the Commission should eliminate the top four-ranked restriction, Fox submitted an empirical study that compares the local news offerings of top four-ranked stations and other stations in the 210 DMAs.[414] The Fox Top Four Study finds that 668 stations ranked among the top four offer local news.[415] We have determined that, because there are less than four stations in some markets, the total number of top four-ranked stations is 779. Therefore, fully 85% of top four-ranked stations offer local news. Fox also found that 164 stations ranked outside the top four offer some local news, although this includes stations that do not originate their own news programming.[416] We have determined that there are 854 stations not ranked among the top four. Thus, even including stations that are re-broadcasting the local news of another station, Fox's data show that only 19% of stations outside the

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[414] Fox Comments, Economic Study A, *News and Public Affairs Programming Offered by the Four Top-Ranked Versus Lower-Ranked Television Stations* ("*Fox Top Four Study*").

[415] *Id.* at 8-14.

[416] *Id.*

top four offer local news. Because top four-ranked stations already provide local news programming, a combination involving more than one top four-ranked station is less likely to result in a new or enhanced local news offering than would a combination involving only one top four-ranked station.

199. We also have determined that same-market combinations yield efficiencies that may expedite a station's transition to DTV. However, combinations involving more than one top four-ranked station also are less likely to provide public interest benefits in the form of new DTV service. The financial position of top four-ranked stations makes the transition to DTV more affordable for these stations.[417] Top four-ranked stations also are more likely to have made the transition to DTV than other stations.[418] We therefore conclude that it is less likely that allowing same-market combinations involving more than one top four-ranked station will expedite the provision of DTV service to the public.

200. Permitting combinations among the top four would reduce incentives to improve programming that appeals to mass

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[417] NAB submitted data comparing the average cash flow and pre-tax profits of Big Four affiliates and other stations. *See* Letter from Jack N. Goodman, Senior Vice President and General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC (Apr. 30, 2003) at 2, Chart 1 ("NAB Apr. 30, 2003 Ex Parte"). These data show that, for example, in 2001, Big Four affiliates in the largest markets (*i.e.*, DMAs 1-25) had an average cash flow of $27,410,975, as compared to just $8,013,317 for stations not affiliated with one of the four major networks. *Id.* The average pre-tax profit of a Big Four affiliate that year was $20,356,967, as compared to only $2,807,447 for other stations in the largest markets. *Id.* Because most stations affiliated with the Big Four networks also are top four-ranked stations, we find this data probative of the differences in the financial positions of top four-ranked stations and other stations.

[418] As of May 21, 2003, 903 commercial DTV stations were on the air pursuant to a license, program test authority or special temporary authority. Of these stations, approximately 60% were paired with analog stations that were ranked among the top four in terms of audience share as of the most recent sweeps period. *See* BIA Media Access Database (Mar. 18, 2003).

audiences. The strongest rival to a top four-ranked station is another top four-ranked station. Because top four-ranked stations typically offer programming designed to attract mass audiences, as opposed to niche audiences, a new popular program offered by one top four-ranked station will have a substantial negative impact on the audience shares of the other top four-ranked stations. The enormous potential gains associated with new popular programs provide strong incentives for top four-ranked stations to develop programming that is more appealing to viewers than the programming of their closest rivals. The large number of viewers looking for new programs with mass audience appeal are the direct beneficiaries of this rivalry. When formerly strong rivals merge, they have incentives to coordinate their programming to minimize competition between the merged stations. Such mergers harm viewers.

201. Our decision to allow common ownership of two television stations in markets with fewer than twelve television stations will result in levels of concentration above our 1800 HHI benchmark in markets with fewer than 12 television stations. We permit this additional concentration because the economics of local broadcast stations justify graduated increases in market concentration as markets get smaller.[419] The record demonstrates that owners of television stations in small and mid-sized markets are experiencing greater

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[419] For purposes of applying our cross media limits, which are diversity based, we found that markets with nine or more television stations have a sufficiently large number of media outlets that viewpoint diversity will be protected by our caps on local television and local radio ownership. Measuring the extent of diversity in a market is a separate question from measuring the extent of competition among a particular class of outlets, such as local television stations. Thus, a market with ten television stations can be characterized as "large" from a viewpoint diversity standpoint because of the substantial number of media outlets available in such markets, but "small to mid-sized" when considering solely competition in the delivered video market (which excludes outlets such as radio, newspaper, and the Internet).

competitive difficulty than stations in larger markets. In particular, NAB submitted financial data comparing the average 2002 gross revenues of commercial stations across all DMAs. The data demonstrate that there are fewer stations in smaller DMAs, but as the average number of stations declines, the reduction in the number of stations is outpaced by the decline in average gross revenue.[420] Thus, small market stations are competing for disproportionately smaller revenues than stations in large markets.[421] NAB also submitted data comparing the average pre-tax profits of Big Four network affiliates in DMAs of various sizes.[422] These data show that affiliates in the largest markets (*i.e.*, the top 25 DMAs) had an average pre-tax profit of $20,356,967 in 2001,[423] as compared with an average pre-tax profit of just $1,269,239 among affiliates ranked highest in audience share in the smallest markets (*i.e.*, DMAs 151-175).[424] The lowest ranked affiliates in the smallest markets showed negative average pre-tax profits at -$92,917.[425] We find these data probative of the different economics of station ownership depending on market size. The data confirm that the ability of local stations to compete successfully in the delivered video market is meaningfully (and negatively) affected in mid-sized and smaller markets.

202. Moreover, Congress and the Commission previously have allowed greater concentration of broadcast properties in smaller markets than in larger markets precisely because the fixed costs of the broadcasting business are spread over fewer potential viewers. In 1992, the FCC allowed one firm to own a

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[420] NAB Apr. 30, 2003 Ex Parte at 2, Chart 1.

[421] *Id.*

[422] *Id.*, NAB Comments, Small to Medium Markets Statement.

[423] NAB Apr. 30, 2003 Ex Parte at 1, 3.

[424] NAB Comments, Small to Medium Markets Statement, Table 6.

[425] *Id.*

larger percentage of the total radio outlets in smaller markets.[426] In 1996, Congress's local radio caps were built on this same principle. In the largest markets, it required six independent station owners, but in the smallest markets, it permitted just two firms to own all the radio stations. The limits we adopt today for local television ownership replicate this graduated tradeoff between optimal competition in the delivered video market (six station owners) and recognition of the challenging nature of broadcast economics in small to mid-sized markets.

203. The above discussion illustrates why we must avoid an oversimplified application of the *DOJ/FTC Merger Guidelines*. In particular, the analysis suggests that anticompetitive harms may result from allowing the largest firms to merge, and that we might lose welfare enhancing efficiency gains by disallowing mergers between stations with large audience shares and stations with small audience shares. To allow the market to realize these efficiency gains and prevent potential harms from undue increases in concentration, we therefore allow combinations of two stations provided they are not both among the top four-ranked broadcast stations in the local market. In markets with at least 18 television stations, we further allow a firm to own up to three stations (thus ensuring a minimum of six owners) provided that only one of them is ranked among the top four.

3. Other Issues

a. Alternate Proposals

(i) Proposals to Retain the Existing Rule in its Current Form or With Minor Modifications

204. A number of commenters urge us to retain the existing rule, or make minor modifications.[427] Children Now proposes

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[426] *See 1992 Radio Ownership Order*, 7 FCC Rcd at 2777 (finding that competitive realities are substantially different in markets of different sizes).

[427] These include AFL-CIO, AFTRA, AWRT, CFA, Children Now, CWA,

that the Commission modify the existing rule by prohibiting common ownership of television stations with overlapping Grade B contours in the same market, as it did prior to its 1999 revisions to the rule.[428] AWRT, AFL-CIO, and AFTRA urge the Commission to retain the existing rule, but to count only those voices that actually provide local programming.[429] Children Now and UCC state that if the Commission chooses to revise the current rule by expanding the types of media voices that are considered for purposes of the local television ownership rule, it should raise the threshold voice count required to form a same-market combination.[430] As we explained above, we have determined that retaining our current rule does not comport with our statutory mandate under section 202(h) on competition, diversity, or localism grounds. For the same reasons, we disagree with commenters who contend that an equally restrictive or more restrictive ownership rule is necessary in the public interest. Although our modified rule does not rely upon a "voice test," it calculates the number of stations one can own in a market based, in part, on the number of stations within that market. However, our decision to "count" only broadcast television stations is based on the likely responses of participants in the DVP market to changes in local market concentration, and is aimed at achieving competition in local markets.

205. Smith proposes that if we relax the rule, we should prohibit common ownership of more than one station affiliated with a top four network.[431] Our revised rule prohibits common

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Smith, Stapleton, and UCC. AFL-CIO Comments at ii, 47; AFTRA Comments ¶ 31; CFA Comments at 9, 284; Children Now Comments at ii, 3; CWA Comments at 3, 46; Smith Comments at 3; Stapleton Comments at 15-16; UCC Comments.

[428] Children Now Comments at 3.

[429] AWRT Comments at 8, AFL-CIO Comments at 56.

[430] Children Now Comments at 3; UCC Comments at 46.

[431] Smith Comments at 3. Smith states that prohibiting combinations of Big

ownership of stations that are among the top four in terms of audience share. Although such stations are often affiliated with top four networks, we conclude that audience share rank is a more accurate measure of market power than network affiliation. Therefore, we do not adopt Smith's proposal to prohibit common ownership of more than one station affiliated with a top four network.

206. CFA asserts that while the Commission has ample justification for retaining the current rule, if it chooses to revise the rule, it should apply an "HHI-adjusted voice count" to local TV ownership.[432] Under CFA's proposal, the Commission would calculate the market shares of television broadcast stations in the relevant geographic market, which would be either the DMA or a "weighted average DMA," calculated to account for the fact that certain stations do not have cable carriage throughout the market.[433] CFA proposes that the Commission define highly concentrated markets as those with fewer than six equal-sized voices or a four-firm concentration ratio above 60%.[434] Moderately concentrated markets would be those with between six and ten equal-sized voices or a four-firm concentration ratio of 40-60%.[435] CFA urges us to prohibit any combination that would result in a highly concentrated market.[436] Where a combination would result in moderate concentration, CFA proposes that we permit the combination only if we find that the merger will serve the public interest and if the owner of the merging stations agrees

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Four network affiliates would help preserve existing independent sources of local news.

[432] CFA Comments at 284-85.

[433] *Id.* at 166-167, 284-85, 289. CFA does not specify whether market shares are to be calculated based on audience share or advertising revenue share.

[434] *Id.* at 286.

[435] *Id.*

[436] *Id.*

to retain separate news and editorial departments in different subsidiaries of the merged entity.[437]

207. Our modified local TV ownership rule will ensure that there are at least six firms in significant number of markets (*i.e.*, all markets with 12 or more television stations), much like CFA's proposal. CFA's proposal does not, however, adequately address record evidence of differences in the economics of broadcast stations in smaller markets. Much like the strict application of the *DOJ/FTC Merger Guidelines* discussed earlier, CFA's proposed test would prohibit certain mergers that will result in welfare enhancing efficiencies. Accordingly, we decline to adopt CFA's proposal. With regard to CFA's waiver proposal, we do not agree that conditioning assignments/transfers on retention of separate news departments within separate subsidiaries of a merged entity is necessary to advance our diversity, competition or localism goals. Requiring compliance with our rules, rather than conducting case-by-case evaluations or imposing merger conditions, is a more effective way to achieve these goals.

208. Entravision does not take a position on whether the rule should be relaxed, but proposes that if the rule is relaxed, the Commission should require periodic certification by owners of same-market combinations that they are not engaged in certain types of anticompetitive conduct that would adversely affect smaller broadcasters in their markets.[438] We do not agree with Entravision that modifying the local TV ownership rule will

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[437] *Id.* at 284-85. Combinations resulting in moderately concentrated markets also would be subject to a *de minimis* exception under which market participants could acquire small firms (*i.e.*, those with a market share of less than 2%). *Id.* at 288.

[438] Entravision Comments at 8-10. Entravision makes the same proposals with regard to relaxation of cross-ownership rules. Id. These certifications would be required in connection with license renewals, applications for assignment or transfer of control of a license, and at license mid-term when stations' EEO compliance is reviewed.

increase the likelihood of anticompetitive conduct by broadcasters that own more than one station in a market, or that a certification requirement is necessary to protect against such conduct. Certainly, if broadcasters engage in anticompetitive conduct that is illegal under antitrust statutes, remedies are available pursuant to those statutes. In addition, an antitrust law violation by a licensee would be considered as part of our character qualifications review in connection with any renewal, assignment, or transfer of a license.

(ii) Proposals to Eliminate or Substantially Modify the Rule

209. Several commenters propose that we eliminate the current rule or substantially modify the rule in order to permit more same-market combinations.[439] Among these are a proposal to allow common ownership of two television stations in all markets with four or more stations, a proposal to eliminate the top four-ranked standard, a proposal to eliminate the voice test provision of the rule but to retain the top four-ranked restriction, NAB's proposed "10/10" standard, and Hearst-Argyle's AMI proposal. Below, we discuss these proposals.

210. We do not agree with several commenters who propose that we eliminate all local television ownership restrictions.[440] As we explained above, the public is best served when numerous rivals compete for viewing audiences. In the DVP market, rivals profit by attracting new audiences and by attracting existing audiences away from competitors' programs. Monopolists, on the other hand, profit only by attracting new

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[439] *See generally*, Alaska Comments; Belo Comments; Duhamel Comments; Emmis Comments; Fox Comments; Granite Comments; Gray Comments; Hearst-Argyle Reply Comments; Media General *et al.* Comments; Paxson Comments; Sinclair Comments; Westwind Reply Comments.

[440] *See* Alaska Comments at 2, 6-7; Fox Comments at 2-3, 6, 33-34, 58-59; Gray Comments at 6, 19; Media General *et al.* Comments at 2, 8; Sinclair Comments at i-iii, 8-9, 60.

audiences; they do not profit by attracting existing audiences away from their other programs. The additional incentives facing competitive rivals are more likely to improve program quality and create programming preferred by viewers.[441] Most commenters proposing elimination of the rule believe that antitrust authorities will protect against any public interest harms that may result from combined ownership of multiple television stations in a market. As we explain at Section III(B) above, we do not agree with commenters who urge us to eliminate our rules and defer all competition concerns to the antitrust authorities.

211. We conclude that, as compared to the modified rule, the rule modification proposals advanced by commenters are more likely to result in anomalies and inconsistencies, or will otherwise fail to serve our policy goals. For example, by proposing that we permit common ownership of two television stations in all markets with four or more stations, Nexstar attempts to account for the differing economics of stations in small markets.[442] However, unlike our modified rule, the Nexstar proposal does not protect against combinations of the market participants with the largest audience shares, combinations that are more likely to cause competitive harms. It also permits extremely high concentration levels in the very smallest markets—there could be as few as two competitors in markets with four television stations. We find that the levels of concentration permitted by the Nexstar proposal are likely to result in harm to competition in local DVP markets.

212. Similar competitive harms would result if we adopted proposals to eliminate or modify the top four-ranked

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[441] For a discussion of program provision under different market structures, *see*, Steiner, *supra* note 403; MOWG Study No. 6 at 3-5; Sinclair Comments, Baumann/McAnneny Statement at 2-6.

[442] Nexstar Comments at 15, 21.

standard.[443] Emmis claims that the top four-ranked standard cannot be justified on diversity or competition grounds.[444] Several commenters agree.[445] We are not relying on the top four-ranked provision of our modified local TV ownership rule to promote diversity, although we recognize that because the marketplace for ideas is broader than the DVP market, rules intended to promote competition also will promote diversity. We disagree with commenters' claims that the top four-ranked standard is not justified on competition grounds. At the time of

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[443] *See* Emmis Comments at 23-33; Fox Comments at 50; Sinclair Comments at 41-46; Letter from Howard M. Liberman, Drinker Biddle & Reath, counsel for Nexstar, to Marlene H. Dortch, Secretary, FCC (May 29, 2003) ("Nexstar May 29, 2003 Ex Parte"); Letter from Gary R. Chapman, President, LIN Television Corporation, Paul H. McTear, President & CEO, Raycom Media, Inc., Bernard E. Waterman, President & Director Waterman Broadcasting Corporation, and Lara Kunkler, President and General Manager, Montclair Communications, Inc., to Marlene H. Dortch, Secretary, FCC (May 15, 2003); Letter from Robert A. Beizer, Vice President of Law & Development, Gray Television, Inc., to Marlene H. Dortch, Secretary, FCC (May 29, 2003) ("Gray May 29, 2003 Ex Parte"); Letter from Jack N. Goodman, Senior Vice President and General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC (May 22, 2003) ("NAB May 22, 2003 Ex Parte") (proposing a tiered approach which would prohibit top four-ranked combinations in DMAs 1-25, top three-ranked combinations in markets 26-75, and top two-ranked combinations in markets 76-210); *Duopoly Relief Needed – 4th Ranked Stations Significantly Trail 3rd Ranked Stations*, Bear Stearns (May 29, 2003) (proposing a top three-ranked standard) ("Bear Stearns May 29, 2003 Ex Parte").

[444] Emmis Comments at 23-33. Emmis states that it has a temporary waiver authorizing its ownership of two television stations in the Honolulu, Hawaii DMA. Emmis Comments at 2. The top four-ranked standard prohibits Emmis' permanent ownership of this combination.

[445] *Fox Top Four Study*, *supra* note 417 (asserting that the top four restriction incorrectly seeks to promote diversity based on an unsupported assumption that top four-ranked stations are more likely to offer local news, although numerous stations that are not among the top four-ranked actually air local news); Sinclair Comments at 41-46, Exhibits 22-23 (asserting that if the intent of local TV rule is to prevent combinations involving stations that offer local news, the should do so explicitly because there is no empirical basis for view that only top four offer local news). *See also* note 446, *supra*.

our last review of the local TV ownership rule, we lacked sufficient record data concerning competitors to local television stations.[446] In the instant proceeding, we face no such shortage of evidence concerning which media compete with local TV. Having determined that television competes with all providers of DVP, we have crafted a rule that appropriately takes account of competition from other sources of DVP, and will ensure competition in local DVP markets. We do not agree that elimination of our top four-ranked standard, use of a top three-ranked standard,[447] or use of a tiered system that would ban mergers among top four-ranked stations only in the largest markets and permit certain top four-ranked combinations in smaller markets,[448] would serve the public interest. As discussed above, top four-ranked combinations are likely to harm competition in the DVP market,[449] and are less likely to produce offsetting public interest benefits.[450]

213. We believe that a more targeted approach to account for possible harms of application of the top four-ranked restriction is to establish a waiver standard tailored to the top four-ranked restriction. This approach will preserve competition in the DVP market while accommodating those instances where application of the top four-ranked restriction would harm the public interest. We discuss modifications to our current waiver standard in a separate section below.

214. Belo takes a nearly opposite approach, proposing that we permit same-market combinations provided that they satisfy our top four-ranked standard, but eliminate our voice test.[451] We agree that, as it is used in our modified rule, a top four-

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[446] Emmis Comments at 31-32.

[447] Bear Stearns May 29, 2003 Ex Parte.

[448] NAB May 22, 2003 Ex Parte.

[449] *See supra* ¶¶ 195-200.

[450] *See supra* ¶¶ 198-199.

[451] Belo Comments at ii-iii.

ranked prohibition is an appropriate means of protecting against combinations that would have an enhanced ability or incentive to engage in anticompetitive conduct.

215. NAB proposes that we permit combinations where at least one of the stations has had, on average over the course of a year, an all day audience share of ten or less (the "10/10" proposal).[452] NAB asserts that the audience share data used for this calculation should include viewing of out-of-market broadcast stations and cable networks, to account for competition from these sources.[453] NAB proposes that we treat the 10/10 standard as a presumption, and urges us to consider proposed combinations that do not meet this standard (including same-market combinations of three stations) on a case-by-case basis, considering factors which we discuss further below along with other waiver proposals.[454] NAB asserts that its proposed test would be easy for applicants to use and for the Commission to apply, would provide needed financial relief for struggling stations in small and medium markets and those that are lower-rated, and, by prohibiting combinations of leading stations, would effectuate our diversity and competition goals.[455] According to NAB, a ten viewing share effectively separates market leading stations from non-leading stations on a consistent basis across DMAs of varying size.[456] NAB urges the Commission to allow broadcasters to transfer combinations created pursuant to the 10/10 standard even if one or both stations has increased its viewing share

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[452] NAB Comments at 79.

[453] *Id.*

[454] *Id.*

[455] *Id.* at 79-81.

[456] *Id.* 81-82. NAB further asserts that the proposal will advance our localism goal by preserving struggling stations and by enhancing stations' financial viability, which will enable them to continue or initiate local news programming. *Id.* at 82-83.

above the ten threshold at the time of such transfer.[457] NAB asserts that requiring licensees to find separate purchasers will be disruptive and will tend to discourage investment in broadcast stations. Of the commenters who support the 10/10 proposal, some support the proposal as advanced by NAB; others support it with modifications; others suggest it be used only as a safe harbor, allowing for many other types of combinations.[458]

216. Although it supports the 10/10 proposal, Hearst-Argyle asserts that the most important deficiency of the proposal is that there is little record support for NAB's contention that ten is an ideal "cut-off point" between leading stations and others. Similarly, UCC states that in many markets, ten is the average share for any given broadcast station, and is not a dividing line between leading and struggling stations.[459] UCC contends that NAB has not shown that all, or even most, stations with a viewing share under ten are struggling to achieve financial viability.[460] UCC asserts that, to the contrary, 10/10 will permit common ownership of top-ranked stations in many markets.[461]

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[457] *Id.* at 83-84.

[458] Coalition Broadcasters Comments at 11-12; Desmond Reply Comments at 8; Duhamel Comments at 2; Gray Reply Comments at 6-7; Hearst-Argyle Reply Comments at 10-11; Pappas Comments at 13-15; Paxson Comments at 30-31; Westwind Reply Comments at 3. Coalition Broadcasters suggest modifying the proposal to establish a threshold share as high as 15 instead of ten for combinations in smaller markets. Coalition Broadcasters Comments at 11-12. Desmond urges us to adopt the proposal but to rely on audience share data that does not include out-of-market or non-broadcast viewing. Desmond Reply Comments at 8. Gray and Paxson support the 10/10 proposal as an alternative to eliminating the current local TV rule. Gray Reply Comments at 6-7; Paxson Comments at 30-31. Sinclair opposes the proposal but suggests that it could serve instead as a safe harbor. Sinclair Reply Comments at 5.

[459] UCC Comments at 20-21, Exhibit 1.

[460] UCC further contends that NAB has not shown that allowing such combinations will benefit the public. UCC Comments at 21, 23. UCC asserts that, to the contrary, such combinations will result in significant harm

217. The record in this proceeding supports a rule that will allow financially weak stations to combine with each other or with stronger stations in order to realize efficiencies. We have identified several benefits of such combinations. The 10/10 proposal, however, would permit mergers between financially strong stations, including top four-ranked stations, in a significant number of markets. Neither the record nor standard competitive analysis justifies a rule that will permit such mergers. Our analysis suggests that combinations among the top four rated broadcast stations would create welfare harms. We also agree with commenters who contend that the proposal does not adequately justify the use of ten as a threshold. The record demonstrates that in many markets ten is the average share for any given station, sometimes even the very highest rated stations, in the market. In addition, the proposal provides no clear rationale to justify why, for example, a combination involving two stations with respective audience shares of 25 and 9 should be permitted, although a combination involving two stations with respective audience shares of 12 and 11 should be prohibited. For these reasons, we reject the 10/10 approach.

218. Hearst-Argyle advances an alternative proposal.[462] Hearst-Argyle's proposal would permit common ownership of any number of television stations in the same market provided that the stations' combined audience share does not exceed 30%.[463] Combinations that would result in an audience share

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to diversity in local markets. *Id.* at 17-20.

[461] UCC Comments at 18, Exhibit 1. As an example, UCC states that only one station in the San Francisco, California DMA has had an average viewing share of ten or more in the past four Nielsen books, which means that, under 10/10, a single entity could combine the top two-ranked stations in the market. *Id.* Similarly, in the Washington, D.C. DMA, three of the four top rated stations have average viewing shares below or near 10. *Id.*

[462] Hearst-Argyle Reply Comments at 13-19.

[463] *Id.* at 14.

above 30% would be subject to an Audience Market Index ("AMI") cap that is calculated in a manner similar to an HHI, but uses audience share data rather than advertising share data.[464] If a combination would result in AMI below 1000, the combination would be permitted, regardless of the increase in concentration.[465] A combination resulting in an AMI between 1000 and 1800 would be permitted if the increase in AMI is less than 100 points, and a combination resulting in an AMI above 1800 would be permitted only if it increases AMI by less than 50 points.[466] Hearst-Argyle asserts that by using an audience share metric, its proposal objectively measures and protects both diversity and competition.[467] Hearst-Argyle contends that its proposal also is likely to survive judicial scrutiny because its 30% hard cap and AMI analysis are both based on antitrust law and analysis.[468] In addition, Hearst-Argyle contends that its proposal avoids several pitfalls of the NAB 10/10 proposal.

219. We do not agree with Hearst-Argyle that simply because courts have accepted presumptions of 30% market share as demonstrating market power in the context of the antitrust statutes, we should establish a presumption that 30% is an appropriate audience share limit. The Hearst-Argyle proposal does not place specific limits on the number of broadcast television stations an entity could own in a local market. An entity could acquire any combination of stations in

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[464] *Id.* at 14-16.

[465] *Id.* at 16.

[466] *Id.* at 16-17.

[467] *Id.* at 17-18. Hearst-Argyle notes that because all viewable channels are included in its analysis, its proposal reflects competition from viewing of cable channels.

[468] *Id.* at 18. Specifically, Hearst-Argyle states that its 30% cap derives from Supreme Court precedent (citing *U.S. vs. Philadelphia National Bank*, 374 U.S. 321, 364 (1963)) and notes that its AMI analysis is similar to DOJ antitrust analysis using the *DOJ/FTC Merger Guidelines*.

a local market as long as its audience share is 30 percent or less, and the AMI cap is satisfied. In many markets, this approach would permit an entity to own four, five, six or more stations. We do not believe that consolidation in a market of a large number of stations with low audience share is in the public interest. Although an individual station may currently have a small audience share in the DVP market, each station's audience share has the potential to change over time. The number of stations a firm owns is a measure of its capacity to deliver programming. This capacity can be as important a factor in measuring the competitive structure of the market as is its current audience share. Moreover, much like the 10/10 proposal, the AMI test will frequently result in common ownership of stations ranked among the top four in the market. It will also permit common ownership of three stations in many more markets than will our modified rule – including some very small markets. As shown by one of Hearst-Argyle's own examples, under certain circumstances, the AMI test would even permit common ownership of three of the top four-ranked stations in a market with just five full-power television stations.[469] Because of the anticompetitive harms that would result from combinations allowed by the AMI test, we will not adopt Hearst-Argyle's AMI proposal.

220. NAB proposes an alternative that would combine the 30% audience share cap of the AMI test with a ban on common ownership of more than three stations in any market, and a ban on common ownership of more than two top four-ranked stations in the same market.[470] For similar reasons, we do not accept this proposal. As discussed herein: (1) a ban on combinations among the top four-ranked stations is necessary to promote competition; (2) a 30% share cap would permit

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[469] *Id.*, Appendix at 1.

[470] Letter from Edward O. Fritts, President and CEO, NAB, to Marlene H. Dortch, Secretary, FCC (May 28, 2003).

combinations that undermine that goal; and (3) ownership of three television stations in markets with fewer than 18 stations would harm competition by consolidating capacity in the hands of too few owners. Our modified rule better effectuates our goal of promoting competition in local DVP markets.

b. Waiver Standard

221. In our *Local TV Ownership Report and Order*, we established a waiver standard for purposes of our local TV ownership rule. The standard permits a waiver of the current rule where a proposed combination involves at least one station that is failed, failing, or unbuilt. We define a "failed station" as one that has been dark for at least four months or is involved in court-supervised involuntary bankruptcy or involuntary insolvency proceedings.[471] Our "failing" station standard provides that we will presume a waiver is in the public interest if the applicant satisfies each of the following criteria: (1) one of the merging stations has had low all-day audience share (*i.e.*, 4% or lower); (2) the financial condition of one of the merging stations is poor;[472] and (3) the merger will produce public interest benefits.[473] Our unbuilt station waiver standard presumes a waiver is in the public interest if an applicant meets

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[471] 47 C.F.R. § 73.3555, Note 7 (1).

[472] We have stated that a waiver is more likely to be granted where one or both of the stations has had negative cash flow for the previous three years. The applicant must submit data, such as detailed income statements and balance sheets, to demonstrate this. Commission staff evaluate the reasonableness of the applicant's showing by comparing data regarding the station's expenses to industry averages.

[473] For purposes of this criterion, we also stated that at the end of the stations' license terms, the owner of the merged stations must certify to the Commission that the public interest benefits of the merger are being fulfilled, including a specific, factual showing of the program-related benefits that have accrued to the public. Cost savings or other efficiencies, standing alone, will not constitute a sufficient showing. *Local TV Ownership Report and Order*, 14 FCC Rcd at 12939 ¶ 81.

each of the following criteria: (1) the combination will result in the construction of an authorized but as yet unbuilt station; and (2) the permittee has made reasonable efforts to construct, and has been unable to do so.[474] For each type of waiver, we also require that the waiver applicant demonstrate that the "in-market" buyer is the only reasonably available entity willing and able to operate the subject station, and that selling the station to an out-of-market buyer would result in an artificially depressed price for the station.[475] Any combination formed as a result of a failed, failing, or unbuilt station waiver may be transferred together only if the combination meets our local TV ownership rules or one of our three waiver standards at the time of transfer.[476]

222. Our rationale for adopting these waiver criteria was that failed, failing and unbuilt stations could not contribute to competition or diversity in local markets, and that the public interest benefits of activating a dark or unbuilt station, or preventing a failing station from going dark, outweighed any potential harm to competition or diversity.[477] Most commenters addressing the waiver standard urge us to relax or eliminate the standard. NAB urges the Commission to evaluate, on a case-by-case basis, combinations that do not meet its proposed local TV ownership rule.[478] For purposes of this case-by-case evaluation, NAB proposes that the Commission expand its

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[474] *Id.* at 12941 ¶ 86.

[475] 47 C.F.R. § 73.3555, Note 7. One way to satisfy this criterion is to provide an affidavit from an independent broker affirming that active and serious efforts have been made to sell the station, and that no reasonable offer from an entity outside the market has been received. *Local TV Ownership Report and Order*, 14 FCC Rcd at 12941 ¶ 86.

[476] *Local TV Ownership Report and Order*, 14 FCC Rcd at 12938-41 ¶¶ 77, 81, 86.

[477] *Id.* at 12941 ¶ 85.

[478] NAB Comments at 79-80. *See also* Gray Comments at ii (urging Commission to establish a flexible waiver standard should it retain any local TV ownership restrictions).

current waiver standard to include consideration of waivers that will facilitate a station's DTV transition or maintain existing local news operations.[479] Paxson agrees.[480] Pappas and NAB urge us to eliminate the requirement that the applicant demonstrate that there are no available out-of-market buyers for a subject station.[481] Coalition Broadcasters assert that the current "failing" station standard is too stringent to provide meaningful relief, and does not reflect market realities.[482] Coalition Broadcasters propose that we eliminate the current waiver standard and evaluate waivers on a case-by-case basis, considering factors such as the financial position of the station, penetration levels of other local media, levels of competition in local markets, and whether a combination will promote innovation.[483] Media General *et al.* urge us to allow transfer of combinations created pursuant to a waiver, even if the combination does not satisfy our local TV ownership rule or waiver standards at the time of transfer.[484] They assert that such transferability would encourage investment in failed, failing, or unbuilt stations.[485]

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[479] NAB Comments at 79-81; Pappas Comments at 14-15.

[480] Paxson Comments at 31. *See also* Gray May 29, 2003 Ex Parte (urging us to consider case-by-case waiver requests for combinations in small and medium markets).

[481] Pappas Comments at 14-15; NAB Comments at 80 n.148.

[482] Coalition Broadcasters Comments at 12-14. *See also* Alaska Comments at 2-3. Coalition Broadcasters contend that the failing station standard's focus on negative cash flow is misplaced, because other factors, such as excessive debt and interest obligations, also can cause a business to fail. Coalition Broadcasters Comments at 12-13. *See also* NAB Comments at 80 n.149 (urging the Commission to eliminate the requirement to demonstrate negative cash flow). Coalition Broadcasters also contend that 4% audience share does not reflect financial viability, and that many stations with higher audience shares also are failing. Coalition Broadcasters Comments at 12-13.

[483] Coalition Broadcasters Comments at 12-14.

[484] Media General *et al.* Comments at 7.

[485] *Id.*

223. UCC opposes relaxation of the current waiver standard, asserting that the relaxation proposals advanced by NAB and others will allow for many more combinations, thereby dramatically reducing viewpoint diversity in local markets.[486] UCC contends that a waiver standard connected to the DTV transition would only delay the DTV transition because it would give broadcasters an incentive to stall transitioning stations in order to qualify for a waiver.[487] CFA supports the adoption of a new case-by-case waiver standard that would allow applicants that do not meet its proposed local TV ownership restriction to obtain waivers if the Commission finds that the combination serves the public interest and if the new owner will preserve functionally separate news and editorial departments within separate subsidiaries.[488]

224. We conclude that tightening our waiver standard would not promote our public interest goals, as discussed below. Moreover, we agree with the NAB and other commenters who urge us to expand our waiver standard to include consideration of combinations that will yield other public interest benefits. Our treatment of waivers will follow the competition principles established in the *DOJ/FTC Merger Guidelines*, with a specific focus on the industry at hand. In particular, as in the *DOJ/FTC Merger Guidelines*, we will consider combinations that involve firms that are not failing but that could better serve the public interest through a merger not otherwise permitted by our rules.[489] We also will consider a waiver of our local TV ownership rule where a proposed combination involves stations that do not engage in head-to-head competition because they do not have overlapping Grade B contours and are not carried by MVPDs in the same geographic areas.

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[486] UCC Reply Comments at 23-26.

[487] *Id.* at 25-26.

[488] CFA Comments at 288.

[489] See the *DOJ/FTC Merger Guidelines* §§ 5.1, 5.2 (discussing mergers involving a failing firm and a failing division).

225. First, for failed, failing, and unbuilt stations, we retain the existing waiver standard with one exception. We remove the requirement that a waiver applicant demonstrate that it has tried and failed to secure an out-of-market buyer for the subject station. In many cases, the buyer most likely to deliver public interest benefits by using the failed, failing, or unbuilt station will be the owner of another station in the same market. We agree with NAB that the efficiencies associated with operation of two same-market stations, absent unusual circumstances, will always result in the buyer being the owner of another station in that market.[490]

226. Otherwise, however, a failed, failing, or unbuilt station clearly cannot contribute to localism, competition or diversity in local markets. Nothing in the record in the instant proceeding leads us to find otherwise. We conclude that the public interest benefits of activating a dark or unbuilt station, outweighs the potential harm to competition or diversity. Therefore, if it can be shown that, absent the transfer, the licensee's assets will exit the market, then the transfer is not likely to either enhance market power or facilitate its exercise. In such cases, the granting of a waiver would not be inconsistent with our competition goal.

227. The record also suggests that local television stations outside the largest markets may, in some cases, better serve the public interest through station combinations not permitted by our local television ownership rules. Our new rules allow one company to own two stations in a market provided both are not ranked in the top four in ratings. This top four-ranked prohibition promotes competition by preventing the strongest competitors in each market from combining. The top four restriction is premised on evidence that the four leading stations in each market are already the strongest competitors and that combinations among them would harm the public interest by

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[490] NAB Comments at 80 n.148.

diminishing competition in the DVP market.[491] However, NAB data shows that, as a class, smaller market stations (including both top four and other stations) are less effective competitors in the DVP market relative to stations in large markets.[492] Therefore, we allowed station combinations that would not be permitted in larger markets. However, our concern for the economics of broadcast television in small market does not lead us to relax the top four prohibition generally because we concluded that this restriction remains necessary to promote competition in the DVP market. Nonetheless, we do recognize that there may be instances where application of this top four restriction will disserve the public interest by preventing marginal -- but not yet "failing" -- stations from effectively serving the needs of their communities. Such stations may not be financially capable of producing the amount of news and local affairs programming that they would like to provide their communities, which in turn may make them less competitive in the local marketplace. Accordingly, in order to effectuate our goals of diversity, localism, and competition, we will consider waivers of the top four-ranked restriction in markets with 11 or fewer television stations. Those are the markets in which we have already recognized that the economics of broadcast television justify relatively greater levels of station consolidation better serve the public interest.

228. In considering waivers of our top four-ranked restriction, we will consider a number of factors. For instance, mergers between stations that reduce a significant competitive disparity between the merging stations and the dominant station in the marketplace are particularly likely to be pro-competitive. Accordingly, waiver applicants should supply television ratings information for the four most recent ratings periods for all local

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[491] *See* ¶¶ 195-200, *supra*.

[492] NAB April 30, 2003 Ex Parte at 2, Chart 1.

stations so that we may assess the competitive effect of the merger.[493]

229. Second, we also will evaluate the effect of the proposed merger on the stations' ability to complete the transition to digital television. Waiver applicants claiming that the merger is needed to facilitate the digital transition should provide data supporting this assertion.

230. We also will consider the effect of the proposed merger on localism and viewpoint diversity. For instance, if both stations do not currently produce a local newscast, the merger is less likely to result in a reduction of viewpoint diversity than if both stations produce news. Similarly, a commitment that the merging parties will significantly increase news and local programming at one or both stations could result in a merger that increases localism and diversity from the status quo. Waiver applicants should submit information about current local news production for all stations in the local market and the effect of the proposed merger on local news and public affairs programming for the affected stations. Applicants stating that the merger is needed to preserve a local newscast should document the financial performance of the affected news division. Applicants for waiver of our top four-ranked restriction must demonstrate that the proposed combination will produce public interest benefits. As in the context of failing station waivers, we will require that, at the end of the merged stations' license terms, the owner of the merged stations must certify to the Commission that the public interest benefits of the merger are being fulfilled. This certification must include a specific, factual showing of the program-related benefits that have accrued to the public. Cost savings or other efficiencies, standing alone, will not constitute a sufficient showing. Finally, our review of waiver requests will account for the diminished reach of UHF stations. As discussed in our national television

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[493] *See, e.g.*, Gray May 29, 2003 Ex Parte.

ownership rule section, UHF stations reach fewer households than VHF stations because of UHF stations' weaker broadcast signals. Reduced audience reach diminishes UHF stations' impact on diversity and competition in local markets. Accordingly, we will consider whether one or both stations sought to be merged are UHF stations.

231. As explained above, our revised local TV ownership rule no longer permits combinations involving stations that do not have overlapping Grade B contours, on grounds that, because of statutory mandatory carriage requirements, most stations compete with each other on a DMA-wide basis. However, we recognize that certain stations are not carried throughout their assigned DMAs, and thus do not compete with each other within their assigned markets. Accordingly, we will consider waivers of our local TV ownership rule where a party can demonstrate that the signals of the stations in a proposed combination: (a) do not have overlapping Grade B contours; and (b) have not been carried, via DBS or cable, to any of the same geographic areas within the past year.

232. With respect to a licensee's ability to transfer or assign a combination involving a station acquired pursuant to a waiver, we do not find support in the record for permitting such transfers where they do not comply with our rules. The transfer or assignment of such a combination must comply with our rules or waiver standards at the time an application to transfer or assign the station is filed.

c. Satellite Stations

233. Television satellite stations retransmit all or a substantial part of the programming of a commonly owned parent station. Satellite stations are generally exempt from our broadcast ownership restrictions. The Commission first authorized TV satellite operations in small or sparsely populated areas with insufficient economic bases to support

full-service operations.[494] Later, we authorized satellite stations in smaller markets already served by full-service operations but not reached by major networks.[495] More recently, we authorized satellite stations in larger markets where the applicant has demonstrated that the proposed satellite could not operate as a stand-alone full-service station.[496] In the *Local TV Ownership Report and Order*, we retained our policy of exempting satellite stations from our local ownership rules.[497] We believe that continued exemption of satellite stations from the local TV ownership rule is appropriate. Our satellite station policy rests on such factors as the questionable financial viability of the satellite as a stand-alone facility, and establishment of service to underserved areas. By adding stations to local television markets where stations otherwise would not have been established, the policy advances the same goals as those underlying our local TV ownership restrictions. Since these stations are licensed only if they cannot survive as standalone, independently operated stations, we find that exempting them from the local TV ownership rule will not harm competition or diversity.

d. Transferability of Combinations Under Modified Rule

234. If an entity acquires a second or third station that complies with our modified rule, it will not later be required to divest if the number of stations in the market subsequently declines below the level consistent with our outlet cap, or if more than one commonly owned station subsequently becomes

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[494] *See, e.g., Authorization of UHF Stations*, 43 F.C.C. 2734 (1954).

[495] *See, e.g., Meyer Broadcasting Co.*, 67 F.C.C.2d 593 (1978), *aff'd mem. sub nom. Dickinson Broadcasting Corp. v. FCC*, 593 F.2d 1371 (D.C. Cir. 1979).

[496] *See Television Satellite Stations, Review of Policies and Rules*, 6 FCC Rcd 4212 (1991).

[497] *Local TV Ownership Report and Order*, 14 FCC Rcd at 12943 ¶ 90.

a top four-ranked station in the market. The impact of such a "springing" rule would be highly disruptive to the market. Like our other rules, however, we will not ignore the public interest underpinnings at the time of a subsequent sale of the combination. Thus, absent a waiver, a combination may not be assigned or transferred to a new owner if the combination does not satisfy our local TV ownership cap at the time of the proposed assignment or transfer.

B. Local Radio Ownership Rule

235. The local radio ownership rule limits the number of commercial radio stations overall and the number of commercial radio stations in a service (AM or FM) that a party may own in a local market. Until 1992, parties were prohibited from owning two same-service (AM or FM) radio stations whose signal contours overlapped.[498] Although this rule effectively prevented radio station combinations from dominating a local radio market, it also prevented efficient radio station combinations from developing. As a result, in 1992, many radio stations were facing difficult financial conditions.[499] To address this concern, the Commission in 1992 relaxed the local radio ownership rule by establishing numerical limits on radio station ownership based on the total number of commercial radio stations in a market.[500]

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[498] Before 1989, the Commission relied on interference contours to determine whether two commonly owned radio stations implicated the rule. In 1989, the Commission began using principal community contours. In either case, parties could own a single AM-FM combination even if their contours overlapped. *See Local Radio Ownership NPRM*, 16 FCC Rcd at 19863-64 ¶¶ 5-7.

[499] *See 1992 Radio Ownership Report and Order*, 7 FCC Rcd at 2757-60 ¶¶ 4-10.

[500] Under the 1992 rules, a party could own 2 AM and 2 FM radio stations in markets with 15 or more commercial radio stations, and three radio stations (of which no more than 2 could be AM or FM stations) in smaller markets. The 1992 rule also imposed an audience share limit on radio station combinations in the larger market. *See* 47 C.F.R. § 73.3555(a)(1)

236. In the 1996 Act, Congress directed the Commission to revise those limits to provide that: (1) in a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM); (2) in a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM); (3) in a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM); and (4) in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market.[501] Those revisions, along with the simultaneous repeal of national limits on radio station ownership,[502] enabled greater consolidation of radio stations in local and national markets. Currently, there are, on average, approximately 10 radio station owners in local markets,[503] and the largest radio station operator, Clear Channel Communications, owns over 1200 radio stations nationwide, representing approximately 10% of the radio stations in the United States.[504] As a result of this consolidation, the radio industry today is on a stronger financial footing than it was a decade ago.[505]

(1995).

[501] 1996 Act, § 202(b).

[502] *See id.*, § 202(a).

[503] *See* MOWG Study No. 11, Radio Industry Review 2002: Trends in Ownership, Fornat, and Finance by George Williams and Scott Roberts (Sept. 2002) at 7 ("MOWG Study No. 11").

[504] *Id.* at 4; *see also* http://www.clearchannel.com/radio/

[505] *See* MOWG Study No. 11 at 13-19.

237. The local radio ownership rule has not been altered since the 1996 Act was adopted. In the 1998 biennial review, the Commission concluded that the rule continued to be necessary in the public interest to preserve competition and diversity in local radio markets.[506] The Commission expressed concern, however, that the methodologies used to define radio markets and to count the total number of radio stations and the number of commonly owned radio stations in a radio market were producing irrational and inconsistent results.[507] The Commission therefore decided in the first biennial review to initiate a rulemaking proceeding to consider changes to those methodologies.[508] In the 2000 biennial review, the Commission endorsed the conclusions reached in the first biennial review with respect to the local radio ownership rule.[509]

238. As contemplated in the first biennial review, the Commission issued the *Radio Market Definition NPRM* in December 2000 to consider changes to the way we define radio markets and calculate the number of radio stations in a market.[510] In November 2001, the Commission issued the *Local Radio Ownership NPRM*, which initiated a broader inquiry into the effect of consolidation in local radio markets and possible changes to local radio ownership rules and policies to reflect the current radio marketplace.[511] These two proceedings (collectively, the "*Radio NPRMs*") are still pending and have been incorporated into this 2002 biennial review proceeding.

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[506] *1998 Biennial Review Report*, 15 FCC Rcd at 11090-91 ¶ 59.

[507] *Id.* at 11091-94 ¶¶ 61-68.

[508] *Id.* at 11094 ¶ 68.

[509] *2000 Biennial Regulatory Review*, 16 FCC Rcd 1207, 1218 ¶ 32 (2001); *see also 2000 Biennial Regulatory Review*, Staff Report, 15 FCC Rcd 21084, 21145-46 (2000).

[510] *Definition of Radio Markets*, *supra* note 8.

[511] *Local Radio Ownership NPRM*, *supra* note 8.

239. We conclude that the numerical limits in the local radio ownership rule are "necessary in the public interest" to protect competition in local radio markets. We conclude, however, that the rule in its current form does not promote the public interest as it relates to competition because (1) our current contour-overlap methodology for defining radio markets and counting stations in the market is flawed as a means to protect competition in local radio markets, and (2) the current rule improperly ignores competition from noncommercial radio stations in local radio markets. To address those concerns, we modify the rule to replace the contour-overlap market definition with an Arbitron Metro market and to count noncommercial stations in the radio market; and we initiate a new rulemaking proceeding as part of this item to define markets for areas of the country where Arbitron Metros are not defined. Although we primarily rely on competition to justify the rule, we recognize that localism and diversity are fostered when there are multiple, independently owned radio stations competing in the same market; our competition-based rule, therefore, will also promote those public interest objectives. We also conclude that, consistent with our focus on competition, joint sales agreements ("JSAs") will result in attribution of the brokered station to the brokering party under certain conditions.

1. Section 202(h) Determination

240. Under Section 202(h), we consider whether the local radio ownership rule continues to be "necessary in the public interest as a result of competition." In determining whether the rule meets that standard, we consider whether the rule serves the public interest, which, in radio broadcasting, traditionally has encompassed competition, localism, and diversity.[512] We examine each of these public interest objectives in turn.

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[512] *Fox Television*, 280 F.3d at 1042.

a. Competition

241. In the Policy Goals section, we explained how the public interest is served by preserving competition in relevant media markets. Although limits on local radio ownership are generally necessary to serve public interest, we conclude that the current local radio ownership rule does not serve the public interest as it relates to competition for two reasons. First, the current rule uses a methodology for defining radio markets and counting the number of radio stations in a market that has not protected against undue concentration in local radio markets. Second, the current rule fails to account for the competitive presence of noncommercial stations in a market. We accordingly modify the rule to address these concerns.

(i) Product market definition

242. To measure the state of competition in radio broadcasting, we first must determine the relevant product markets in which radio stations compete and the other media, if any, that compete in those markets.[513] We conclude that radio broadcasters operate in three relevant markets: radio advertising, radio listening, and radio program production.

243. *The Radio Advertising Market.* We conclude that advertisers do not view radio stations, newspapers, and television stations as substitutes.[514] A number of commenters

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[513] A product market includes identical products, products with such negligible differences that buyers regard them as substitutes, and other products that buyers regard as such close substitutes that a slight price increase in one will induce shifts of demand away from the other. *See DOJ/FTC Guidelines.*

[514] MOWG Study No. 10 at 12; *see also United States v. Jacor Communications Inc.*, 1996 WL 784589, *10 (S.D. Ohio 1996) (advertisers perceive radio as a distinct advertising medium from television or newspapers); Robert Ekelund, George Ford, and John Jackson, *Is Radio Advertising a Distinct Local Market? An Empirical Analysis*, 14 REV. INDUS. ORG. 239 (1999) (radio advertising constitutes a distinct market). By definition, noncommercial radio stations do not compete in the radio advertising market.

have argued that there is little substitution between advertising on broadcast TV and newspapers. For example, CWA urges the Commission to adopt local ownership rules that treat TV, newspapers, and radio as separate local product markets.[515] This conclusion is consistent with MOWG Study No. 10, which found "weak substitutability" among various local media outlets for purposes of local advertising sales.[516] It is also consistent with antitrust cases filed by the Department of Justice, in which it has alleged that radio advertising constitutes a separate antitrust market.[517] Thus, at least in terms of their revenue generating "customers," radio advertising, newspaper advertising, and television advertising make up distinct product markets.[518]

244. Further, other empirical studies confirm that advertisers do not view ads in newspapers and broadcast radio as substitutes. Authors Alvin Silk, Lisa Klein, and Ernst Berndt (2002) examine advertising substitution among eight media in the national markets.[519] They report only weak substitution between newspapers and other media. Reid and King (2000) conducted a study based on interviewing and surveying advertising managers in national markets and concluded that

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[515] CWA Comments at 13-16.

[516] MOWG Study No. 10 at 12. For a technical discussion of MOWG Study No. 10, see Appendix E.

[517] *See, e.g.*, Complaint ¶¶ 11-14, United States v. Clear Channel Communications, No. 1:00CV02063 (D.D.C. filed Aug. 29, 2000); Complaint ¶ 12, United States v. EZ Communications, Inc., No. 1:97CV00406 (D.D.C. filed Feb. 27, 1997).

[518] Various commenters have argued that other types of advertising – such as billboards and telephone directories – also are in the same product market with radio advertising. There is, however, no evidence in the record or in the academic literature to support that argument.

[519] Alvin J. Silk, Lisa R. Klein, and Ernst R. Berndt, *Intermedia Substitutability and Market Demand by National Advertisers*, REV. INDUS. ORG. 323-348 (June 2002).

these managers did not view radio as a good substitute for other media in advertising.[520] The evidence presented in MOWG Study No. 4 also suggests that advertisers do not substitute perfectly between radio and other forms of media.[521] We acknowledge that the studies discussed in this paragraph focus on national advertising markets.[522] Nothing has been submitted

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[520] Leonard N. Reid and Karen Whitehill King, *A Demand-Side View of Media Substitutability in National Advertising: A Study of Advertiser Opinions about Traditional Media Options*, 77(2) J MASS COMM Q 292-307 (Summer 2000).

[521] MOWG Study No. 4, Consolidation and Advertising Prices in Local Radio Markets by Keith Brown and George Williams (Sept. 2002) ("MOWG Study No. 4"). The authors report that increases in concentration in the radio market contributes to a modest increase in radio advertising prices. This evidence of market power suggests that advertising on radio is not a perfect substitute with advertising on other media. Dean Baker, in comments submitted by AFL-CIO, criticizes MOWG Study No. 4 for concluding that income growth was the main factor behind the sharp surge in ad prices following the relaxation of radio ownership rules. He argues that misspecification of the model may have led to understating the effects that concentration has on radio advertising prices. We do acknowledge, as Baker argues, that the authors did not include years prior to the 1996 Act that might help establish the relationship between concentration in the radio market and prices in radio advertising. There is, therefore, a possibility that MOWG Study No. 4 understates the effect that ownership concentration in local radio markets has on radio advertising prices. But any such understatement would only lend further support to our conclusion that radio advertising is a separate product market.

[522] *See, e.g.*, Clear Channel Comments, Statement of Professor Jerry A. Hausman, at 12-17. Hausman also argues that the regressions conducted in MOWG Study No. 4 did not include the prices of broadcast television, newspaper, and cable advertising and therefore the coefficients found on the measures of concentration are unreliable, that the result is not robust when other measures of concentration are used, and that the size of the coefficient that Brown and Williams report does not warrant concern. As to the first point, the staff has found that the results of MOWG Study No. 4 were not significantly changed when the price of broadcast television was added to the regression. We believe, therefore, that the findings presented by MOWG Study No. 4 are robust even if other media are included. As to the remaining two points, the MOWG Study's use of natural logarithms of the HHI is

in the record, however, that suggests that local advertisers are better able to substitute between radio and other media than are national advertisers, and the studies' results are consistent with the results of MOWG Study No. 10, which did examine local advertisers.

245. *The Radio Listening Market.* We conclude that radio listening is a relevant product market.[523] There is no evidence that radio listeners consider non-audio entertainment alternatives (*e.g.*, reading and watching television) to be good substitutes for listening to the radio. We therefore disagree with commenters that argue that the relevant market should be broadened from radio listening to include non-audio entertainment options.[524] We also disagree with commenters who argue that the relevant product market should be broadened to include other delivered audio media, such as Internet audio streaming and satellite radio.[525] Internet audio streaming may be a substitute for broadcast radio when

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consistent with a widely examined class of economic models, and, although Hausman is correct that the study reports a small coefficient, we believe that a small, statistically significant coefficient is sufficient to support our conclusion of imperfect substitution between radio advertising and other markets.

[523] The relevant product market includes "all products 'reasonably interchangeable by consumers for the same purposes.'" *United States v. E.I du Ponte de Nemours & Co.*, 351 U.S. 377, 395 (1956).

[524] In defining the relevant product market for merger analysis, one starts with the products supplied by the merging firms and asks whether a monopolist, supplying those products, would profitably impose "a small but significant and non-transitory price increase." If the monopolist would not be able to impose such a price increase, then one adds in the next closest substitute to the products of the merging firms and repeats the experiment. Gregory J. Werden, *The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm*, at http://www.usdoj.gov/atr/hmerger/11256.htm (visited Mar. 20, 2003). This approach has been referred to as the "smallest market principle."

[525] Murphy Comments in MM Docket No. 00-244 at 3; Jimcar Comments in MM Docket No. 00-244 at 1.

listening takes place while working on a computer or in a small office environment. A significant portion of audio listening, however, occurs while driving or otherwise outside of the office or home.[526] Since most people do not access Internet audio from a mobile location, we conclude that Internet audio streaming is not a substitute for broadcast radio for a significant portion of audio listening.[527] Similarly, satellite radio may be a substitute for broadcast radio for the fewer than 600,000 people that subscribe to satellite radio.[528] But the vast majority of the population does not subscribe to a satellite radio service.[529] Accordingly, we conclude that satellite radio is not yet a good substitute for broadcast radio for most listeners.

246. Preserving competition for listeners is of paramount concern in our public interest analysis. Although competition in the radio advertising market and the radio program production market indirectly affect listeners by enabling radio broadcasters to compete fairly for advertising revenue and programming – critical inputs to broadcasters' ability to provide service to the public – it is the state of competition in the listening market that most directly affects the public. When that market is competitive, rivals profit by attracting new audiences and by attracting existing audiences away from competitors' programs. Monopolists, on the other hand, profit

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[526] *See Arbitron, Radio Today: How America Listens to Radio* (2003) at http://www.arbitron.com/downloads/ radiotoday03.pdf ("*Radio Today*").

[527] *See* MMTC Comments in MM Docket No. 01-317 at 13-14 n.23 ("availability of the Internet has been overstated"); MMTC Reply Comments in MM Docket No. 01-317 at 31 (Internet radio occupies only about 4% of radio listening at home and work); UCC Comments in MM Docket No. 01-317 at 9 (Internet radio, which requires the use of a computer and modem does not offer the benefit of mobility, and cannot reach the mobile users).

[528] *See supra* ¶ 127. In contrast, local radio stations reach approximately 94% of the U.S. population each week. *See Radio Today*, *supra* note 529 at 3.

[529] UCC Comments in MM Docket No. 01-317 at 11; MMTC Comments in MM Docket No. 01-317 at 32.

only by attracting new audiences; they do not profit by attracting existing audiences away from their other programs. Because the additional incentives facing competitive rivals are more likely to improve program quality and create programming preferred by existing listeners,[530] it is critical to our competition policy goals that a sufficient number of rivals are actively engaged in competition for listening audiences. Limits on local radio ownership promote competition in the radio listening market by assuring that numerous rivals are contending for the attention of listeners.

247. *Radio Program Production Market.* Radio stations seek to acquire audio programming from a variety of audio program producers. Many sellers of audio programming do not have adequate substitutes for local radio stations. The record indicates that radio stations are an important mechanism by which the American public is made aware of new music.[531] Moreover, the record suggests no reasonable alternative available to producers of radio talk shows – a type of radio programming that has become increasingly popular in the last decade.[532] To the extent that the radio stations in a local community are owned by one or a few firms, those firms could constitute a bottleneck that would impede the ability of radio programming producers to make their programming available to consumers in that community. Accordingly, we conclude that radio programming constitutes a separate relevant product market.

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[530] For a discussion of program provision under alternative market structures, see, Steiner, *supra* note 403; MOWG Study No. 6 at 3-5; and Sinclair Comments, Baumann/ McAnneny Statement at 2-6.

[531] *See* Future of Music Coalition Comments, *Radio Deregulation: Has It Served Citizens and Musicians*, at 61-67; AFTRA Comments in MM Docket No. 01-317 at 12-14.

[532] *See* NAB Comments in MM Docket No. 01-317 at 19; NAB Reply Comments in MM Docket No. 01-317 at 8-9.

(ii) Geographic Market Definition

248. Competition analysis requires that we determine the relevant geographic market in which radio stations compete. There is no serious dispute that the relevant geographic market for the product markets in which radio stations compete is local: advertisers and program producers seeking to reach listeners in a local community cannot readily substitute radio stations (or any other media) that do not serve that community for the local radio stations that do. The parameters of the local market, however, have been a source of considerable debate and controversy.[533] We currently use a contour-overlap methodology for defining radio markets and determining the number of radio stations that are in those markets.[534] That methodology has been subject to intense criticism for producing unrealistic and irrational results, which in turn lead the Commission to issue two separate rulemaking notices – the *Radio NPRMs* – to examine the problems associated with the contour-overlap system in greater detail.

249. We have examined the record developed from the *Radio NPRMs* in conjunction with our overall biennial review of the media ownership rules. Based on the record and our own experience, we now conclude that the contour-overlap system should be replaced by a more rational and coherent methodology based on geographically-determined markets to promote more effectively our competition policy goals.

(a) Problems with the Existing Radio Market Definition and Counting Methodologies

250. We currently rely on the principal community contours of the commercial radio stations that are proposed to be commonly owned to determine the relevant radio market in

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[533] *See Local Radio Ownership NPRM*, 16 FCC Rcd at 19862-70 ¶¶ 3-18.

[534] See Appendix F for a more detailed explanation of the current contour overlap methodology.

which those stations participate and to count the other radio stations that are in the market.[535] We first consider whether an area of overlap exists among the principal community contours of all of the stations proposed to be commonly owned. If no such overlap area exists, then the radio stations involved are presumed to be in separate radio markets, and the local radio ownership rule is not triggered. If one or more areas of contour overlap exist, however, the rule is triggered,[536] and we must determine whether the proposed combination complies with the limits specified in the rule.

251. We first ask how many stations a party would own in the relevant radio market (*i.e.*, the "numerator" of the fraction upon which the numerical limits in the local radio ownership rule are based). Under our current methodology, we deem the radio stations whose principal community contours mutually overlap to be in the same market, and we deem those stations to be the only stations owned by the common owner in that market. In some instances, a radio station's principal community contour will overlap some, but not all, of the principal community contours of other commonly owned radio stations. In those cases, separate radio markets will be formed from the mutual contour overlaps of different subsets of commonly owned radio stations. We nevertheless apply the same rule: In each of those separate markets, we deem the radio stations whose principal community contours mutually overlap to be in the same market, and we deem those stations to be the only stations owned by the common owner in that market.

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[535] The principal community contour for AM stations is the predicted or measured 5 mV/m groundwave contour and for FM stations is the predicted 3.16 mV/m contour. 47 C.F.R. § 73.3555(a)(3)(i).

[536] A single AM/FM combination is always permitted. 47 C.F.R. § 73.3555(a)(2) (overlap between two stations in different services is permissible if neither of those two stations overlaps a third station in the same service.)

252. After calculating the numerator for a particular radio market, we next determine the size of the market (*i.e.*, the "denominator" in the fraction). To do this, we again rely on principal community contours. We count as being in the relevant radio market the radio stations that are included in the numerator. We add to this number every other commercial radio stations whose principal community contour overlaps the principal community contour of *at least one* of the stations counted in the numerator. The total represents the size of the market against which the number of commonly owned stations (*i.e.*, the numerator) is evaluated to determine whether the proposed combination complies with the local radio ownership rule.

253. One significant problem with the current contour-overlap system is what is known as the "Pine Bluff" problem, or the "numerator-denominator" inconsistency.[537] As explained above, a party is deemed to own only those stations that are represented in the numerator, *i.e.*, stations that have mutually overlapping principal community contours. In calculating the denominator, however, any radio station whose principal community contour overlaps the principal community contour of *at least one* of the radio stations in the numerator is counted as being in the market, regardless of who owns that station. As a result, the denominator may include radio stations that are owned by the same party that owns the radio stations represented in the numerator. Because those stations are counted in the denominator, they are by definition "in" the market, but they would not count against the party's ownership limit in that market unless their principal community contours overlap the principal community contours of all of the radio stations in the numerator.

254. The numerator-denominator inconsistency has two potential and interrelated effects that highlight the problems

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[537] *Application of Pine Bluff Radio, Inc. (Assignor) and Seark Radio, Inc. (Assignee)*, 14 FCC Rcd 6594 (1999).

with our current methodology. First, by counting commonly owned stations in the denominator that are not counted in the numerator, a party may be able to use its own radio stations to increase the size of the radio market and thereby "bump" itself into a higher ownership tier. Second (and more commonly), the inconsistency enables a party to own radio stations that are in the relevant radio market (as determined by our rules) without having those stations count against the party's ownership limit in that market.[538] The current system of counting radio stations thus enables a party, by taking advantage of the effects of the numerator-denominator inconsistency, to circumvent our limits on radio station ownership, which are intended to protect against excessive concentration levels in local radio markets.

255. We cannot fix the problems associated with our current methodology merely by excluding commonly owned stations from the denominator or including those stations in the numerator.[539] If we exclude commonly owned stations from the denominator, then we would be determining which radio stations are in the market based on who owns those stations, a distinction that would be both unprincipled and unprecedented in the history of competition analysis. If we include in the numerator commonly owned stations represented in the denominator, a party's ownership level in a particular market may be overly inflated by outlying stations far from the area of concentration.[540] Each of these proposals thus would create new "reverse" anomalies to cancel out the effects of the numerator-denominator inconsistency.

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[538] The first effect arises from *including* commonly owned radio stations in the denominator. The second effect arises from *excluding* those stations from the numerator.

[539] This is one of the options we suggested as a remedy for the "Pine Bluff" problem if we decided to retain a contour-overlap radio market definition. *See Radio Market Definition NPRM*, 15 FCC Rcd at 25077 ¶ 9.

[540] *See* Aurora Comments in MM Docket No. 00-244 at 20-22; NAB Comments in MM Docket No. 00-244 at 28.

256. Our experience with the current contour-overlap methodology leads us to the conclusion that it is flawed as a means to preserve competition in local radio markets, and that we should take an entirely new approach to market definition.[541] As is clear from our description of the current market definition and counting methodologies, the size of a radio market under our current system is unique to the proposed combination being evaluated. A different combination of radio stations, or the addition or subtraction of a radio station from the combination, has the potential to change the area covered by the principal community contours of the combination and, thus, to change the number of commercial radio stations that are counted as being in the market. This is a singular and unusual method for determining the size of a market. Under traditional antitrust principles, the "relevant geographic market" is used to identify the parties that compete in that market.[542] Our contour-overlap methodology, in contrast, uses the outlets of one party – commonly owned stations with mutually overlapping principal community contours – to define the local radio market and identify other market participants. This is an inherent aspect of the contour-overlap methodology that is not in line with coherent and accepted methods for

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[541] In light of our analysis, we reject the various proposals that some commenters have advanced to reform the contour-overlap system. *See, e.g.*, Main Street Comments in MM Docket No. 01-317 at 2 (proposing change to AM propagation standard); Davis Comments in MM Docket No. 01-317 at 3 (proposing change from principal community contour to interference standard).

[542] The DOJ identifies a relevant geographic market as the region where a hypothetical monopolist that is the only producer of the relevant product in the region would profitably impose at least a "small but significant and nontransitory" increase in the price of the relevant product, assuming that the prices of all products provided elsewhere do not change. *DOJ/FTC Merger Guidelines* § 1.21. This approach is consistent with the Supreme Court's definition of the relevant geographic market as the region "in which the seller operates, and to which the purchaser can practicably turn for supplies." *United States v. Grinnell Corp.*, 348 U.S. 563, 588-89 (1966).

delineating geographic markets for purposes of competition analysis.

257. The conceptual problems with the contour-overlap methodology have significant implications for our ability to guard against undue concentration in local radio markets. Because radio stations with larger signal contours are more likely to reach a wider audience, consolidation of these radio stations in the hands of one or a few owners increases the potential for market power in local radio markets. Yet the contour-overlap system actually encourages consolidation of powerful radio stations because stations with larger signal contours are more likely to create larger radio markets, which make it more likely that a party would be able to acquire additional radio stations in that market.[543] Thus, by creating this perverse incentive, the contour-overlap methodology may undermine the primary public interest rationale for the local radio ownership rule.[544]

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[543] *See, e.g.*, Bear Stearns Ex Parte Presentation, *A Defining Moment in Radio?* by Victor B. Miller (May 12, 2003) at 10 ("*Defining Moment in Radio*").

[544] NAB proposes to limit the contour of Class A, AM stations for determining the number of stations that comprise a radio market to a non-directional 5-kilowatt facility (Regional Class B facility). *See* Letter from Jerianne Timmerman, NAB, to Marlene H. Dortch, Secretary, FCC (Jan. 24, 2003) ("NAB Jan. 24, 2003 Ex Parte"). Class A stations usually have very large principal community contours, which results in stations being counted in the market that may be very far away from the proposed combination of stations that define the market. Alternatively, NAB proposes to address the "large signal" anomaly by "excluding from the count of stations in a market any station – irrespective of service – whose transmitter site is more than 92 kilometers (58 miles) from the area of common overlap of the stations being acquired." *See* Letter from Edward O. Fritts, NAB, to Michael K. Powell, Chairman, FCC (May 23, 2003). Although either of these approaches could reduce the number of stations counted in a market, the problems with contour-overlap approaches are not limited to situations in which there is a large signal. However, as explained *infra* at ¶¶ 282-286 we adopt NAB's second proposal in the interim modified contour-overlap rule to be used for stations located outside of Arbitron Metro's until the completion of the

258. Other aspects of our contour-overlap methodology also limit its usefulness in protecting and promoting competition. The method for determining which stations are in a market often does not reflect the area of true competition among radio stations. We currently count a radio station as being a competitor in a radio market if its principal community contour overlaps any one of the principal community contours that form the market boundary. Those radio stations may be too distant to serve effectively either the listeners or the advertisers in the geographic area in which concentration is occurring, but they are included in the market because of the happenstance of the size, shape, or location of one or more of the principal community contours of the radio stations involved.

259. The contour-overlap methodology also makes it difficult to measure concentration levels in local radio markets accurately. As currently implemented, the methodology does *not* examine the number of radio station owners in a market; it only considers how many radio station signals cross the market boundary created by the principal community contours of commonly owned stations with mutually overlapping contours. Those signals may be owned by only one other party; indeed, because of the numerator-denominator inconsistency, those radio stations may be owned by the same party. The current methodology simply does not take ownership into account, which makes an accurate measure of local radio concentration difficult to achieve.

260. Consistency suffers as well. Under the contour-overlap methodology, every combination operates in a radio market that is unique to that combination.[545] Thus, there is no common metric that we can use to compare the effect of two different combinations on competition.[546] In fact, we cannot even

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rulemaking proceeding in Docket No. 03-130.

[545] *Local Radio Ownership NPRM*, 16 FCC Rcd at 19880 ¶ 44; *Defining Moment in Radio* at 10.

[546] *See* NAB Comments in MM Docket No. 01-317 at 34 ("Utilizing a

rationally evaluate the effect that adding a new radio station to an existing combination would have on competition because the relevant radio markets before and after the acquisition may be completely different, depending on the vagaries of the contour overlaps.

261. Commenters nonetheless argue that we may not alter the market definition unless we conclude that the current market definition has caused actual harm to our public interest goals.[547] We do not agree that we must demonstrate actual harm to move from an irrational market definition to a rational one. Any analysis of the potential harms of concentration should be focused on the limits on how many stations a party may own in a market, rather than on whether a distorted methodology for defining radio markets and counting radio stations should be preserved.[548]

262. We recognize that our current view differs from what we stated in 1992 when we first adopted the contour-overlap methodology for defining radio markets and counting market participants.[549] At the time, however, the numerical limits prohibited station combinations in excess of 2 AM and 2 FM

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contour overlap method of market definition for competitive purposes would essentially require each applicant to submit a customized competition analysis based on the unique market created by every proposed transaction.").

[547] *See, e.g.*, NAB Comments in MM Docket No. 00-244 at 12-13, 28.

[548] In any event, the record does provide some evidence of potential competitive harm. MOWG Study No. 4 suggests that consolidation has resulted in an increase in advertising prices. *See* discussion of product market, Section VI(B)(1)(a)(i), *supra*. In addition, several smaller broadcasters have asserted that consolidation has created market power, which has resulted in significant harm to their ability to generate advertising revenue, to invest in improvements to radio service, and even to stay in business. *See* discussion of rejection of repeal and other modifications, Section VI(B)(1)(a)(iii)(b).

[549] *See 1992 Radio Reconsideration Order*, 7 FCC Rcd at 6394-96 ¶¶ 37-43.

stations, and imposed on top of that an audience share cap of 25% in the largest markets. Even though the problems with the contour-overlap system were present at the beginning, the effect was less evident because of the far more restrictive ownership limits. It was only after the ownership limits were substantially raised in the 1996 Act that the scope of the market distorting effects of that system became manifest. In light of this experience, it would be irresponsible for us to leave uncorrected our market definition and counting methodology.

263. In short, our experience with the contour-overlap system leads us to believe that it is ineffective as a means to measure competition in local radio markets, and that a different method of defining the market will more effectively serve our goals. We see scant evidence in the record to lead us to a different conclusion. Some commenters correctly note that any methodology we develop may create anomalous situations in certain instances.[550] But we cannot agree that our inability to achieve perfection in every instance justifies maintaining the current system. We conclude that our methodology for defining radio markets and counting market participants must be changed.

(b) Statutory Authority

264. Before explaining our modified market definition and counting methodologies, we address arguments that we lack the statutory authority to revise those methodologies in a way that would prohibit radio station combinations that are permissible under the current framework. After reviewing the relevant statutory provisions, we find that argument to be without merit.

265. The Communications Act grants us the authority to "[m]ake such rules and regulations, . . . not inconsistent with

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[550] *See, e.g.*, Cumulus Comments in MM Docket No. 01-317 at 15; Nassau Reply Comments in MM Docket No. 01-317 at 5; NAB Comments in MM Docket No. 00-244 at 5; MBC Comments in MM Docket No. 00-244 at 5; Cumulus Comments in MM Docket No. 00-244 at 5; Cox Comments in MM Docket No. 01-317 at 12.

law, as may be necessary to carry out the provisions of" the Act.[551] We also are authorized to "make such rules and regulations . . . not inconsistent with [the] Act, as may be necessary in the execution of [our] functions."[552] The Supreme Court has held that these broad grants of rulemaking power authorize us to adopt rules to ensure that broadcast station ownership is consistent with the public interest.[553] We find nothing in the 1996 Act or its legislative history that diminishes that authority.[554] To the contrary, Section 202(b) contemplated that we would exercise our rulemaking authority to make the revisions to the rule that Congress required, and Section 202(h) contemplates that we will exercise our rulemaking authority to repeal or modify ownership rules that we determine are no longer in the public interest. We accordingly find that we have the authority to revise the local radio ownership rule in a manner that serves the public interest.

266. Some commenters nevertheless argue that the 1996 Act restricts how we may define the "public interest." They contend that Congress specifically found the levels of radio station ownership specified in Section 202(b) to be in the public interest. Because Congress has specifically spoken, the argument goes, we no longer have the discretion to interpret the public interest in a manner that, in purpose or effect, precludes a radio station combination that complies with the numerical

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[551] 47 U.S.C. § 303(r).

[552] 47 U.S.C. § 154(i).

[553] *See, e.g., Storer Broadcasting*, 351 U.S. at 202-03.

[554] *See, e.g., Keene Corp. v. United States*, 508 U.S. 200, 209 (1993) (statutory revisions are not presumed to change the law unless "an intent to make such a change is clearly expressed") (internal punctuation omitted). *Accord United States v. Wilson*, 503 U.S. 329, 336 (1992); *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 521 (1989). *See also* 1996 Act, § 601(c)(1), 110 Stat. 143 (1996 Act "shall not be construed to modify, impair, or supersede Federal . . . law unless expressly so provided").

limits of the current rule, as determined by the existing market definition and counting methodologies.[555]

267. We find that argument flawed. Even assuming *arguendo* the premise of the argument – that Congress intended Section 202(b) as a statement of the radio station ownership levels that would be conclusively consistent with the public interest – it does not follow that Congress intended that statement to remain true in perpetuity. In *Fox*, the court held, in the context of the national television ownership cap, that the numbers Congress selected "determined only the starting point" for analysis and instructed us not "to defer to the Congress's choice" of numbers in our analysis.[556] Thus, even if Congress believed in 1996 that Section 202(b) set the appropriate radio station ownership levels, *Fox* holds that we retain the authority – indeed, the obligation – to determine ourselves whether a change in the rules would serve the public interest.

268. In *Fox*, of course, the court was addressing whether we were required to defer to the ownership limits established in the 1996 Act in justifying retention of the national television ownership rule. But if *Fox* correctly held that we should not defer to the 1996 Act in deciding whether a rule continues to be in the public interest, we see no statutory basis to suggest that the 1996 Act in some way prevents us from changing the way we define radio markets or count radio stations.

269. Commenters arguing against our statutory authority place great weight on the *Fox* court's holding that Section 202(h) "carries with it a presumption in favor of repealing or modifying the ownership rules."[557] We recognize that the

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[555] *See, e.g.*, NAB Comments in MM Docket No. 01-317 at 7-10; Radio One Comments in MM Docket No. 01-317 at 4; Clear Channel Comments in MM Docket No. 01-317 at 10; Clear Channel Comments in MM Docket No. 01-317 at 2; NAB Reply Comments in MM Docket No. 01-317 at 3.

[556] *Fox Television*, 280 F.3d at 1043.

[557] *Id.* at 1048.

Section 202(h) presumption requires us to justify a decision to retain the rule. The purpose of the presumption is thus to shift the traditional administrative law burden from those seeking to modify or eliminate the rule to those seeking to retain it. It would be a substantial leap, however, to read this presumption as having the additional effect of limiting the types of changes that we may conclude are in the public interest.[558] We see no basis for such a view. Had Congress intended to curtail the Commission's regulatory powers so drastically, it would have done so in more express terms.[559]

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[558] Cox argues that the Commission found that it lacked statutory authority to change the local radio ownership rule in the *1998 Biennial Review Report*. Cox Comments in MM Docket No. 01-317 at 4. In that report, the Commission stated that tightening the ownership limits would be "inappropriate given that Congress directed the Commission to adopt these limits in 1996." 1998 *Biennial Review Report*, 15 FCC Rcd at 11091 ¶ 60. This statement does not speak to the Commission's authority; rather, it reflects the Commission's policy decision to "monitor . . . consolidation and gather information regarding the overall impact on competition and diversity" before considering changes to the limits established by Section 202(b). *Id.* at 11088 ¶ 53. *See also Fox Television*, 280 F.3d at 1042 (noting that the Commission had adopted a "wait-and-see" approach in the *1998 Biennial Review Report*). Indeed, in the same report, the Commission concluded that it should initiate a rulemaking proceeding to consider changes to the way markets are defined and radio stations counted, finding that the current "definitions and methodologies may be undermining Congress' intent." 15 FCC Rcd at 11091 ¶ 61. The Commission would not have taken this action if it had concluded that Section 202(b) foreclosed revisions that would make the local radio ownership rule more restrictive.

[559] *American Hospital Ass'n v. NLRB*, 499 U.S. 606, 613 (1991) ("As a matter of statutory drafting, if Congress had intended to curtail in a particular area the broad rulemaking authority [it has] granted . . . , we would have expected it to do so in language expressly describing [such] an exception . . . . If [a statute] had been intended to place [such an] important limitation . . . , we would expect to find some expression of that intent in the legislative history."); *cf. Landgraf v. USI Film Prods.*, 511 U.S. 244, 259 (1994) ("we find it most unlikely that Congress intended the introductory clause to carry the critically important meaning petitioner assigns it").

270. Invocation of the ratification, or reenactment, doctrine does not alter the analysis.[560] Under that doctrine, Congress is presumed to have adopted the settled judicial interpretation of a statute when it reenacts that statute.[561] "Congress' repetition of a well-established term [also] carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations."[562] The ratification doctrine may not be invoked, however, where there is no "evidence to suggest that Congress was even aware" of an agency's position.[563] It is not enough for Congress to be presumed to know the law; Congress must make an "affirmative step" to ratify the agency's position.[564]

271. We conclude that the ratification doctrine is not applicable here. We find nothing in the 1996 Act or in its legislative history that evidences a congressional intent to adopt the market definition and counting methodologies that the Commission adopted in 1992. Contrary to certain commenters' arguments,[565] moreover, the Commission did not acquiesce to the ratification theory in 1996 by carrying forward these methodologies without notice and comment. The Commission merely noted that the revisions mandated by Section 202(b) did

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[560] *See, e.g.*, Clear Channel Comments in MM Docket No. 00-244 at 3.

[561] *See, e.g., Keene Corp.*, 508 U.S. at 208.

[562] *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

[563] *Brown v. Gardner*, 513 U.S. 115, 121 (1994) (citing *United States v. Calamaro*, 354 U.S. 351, 359 (1959)).

[564] *International Union, UAW v. Brock*, 816 F.2d 761, 767 (D.C. Cir. 1987) (citing *SEC v. Sloan*, 436 U.S. 103, 121 (1978)). *Accord American Fed. of Labor and Congress of Indus. Orgs. v. Brock*, 835 F.2d 912, 915-16 (D.C. Cir. 1987).

[565] *See, e.g.*, Clear Channel Comments in MM Docket No. 01-317 at 9; Cox Comments in MM Docket No. 01-317 at 4; Cumulus Comments in MM Docket No. 01-317 at 4 n.2.

not directly affect the market definition and counting methodologies in the local radio ownership rule.[566]

272. Even if the ratification doctrine could be invoked, that would not "preclude [an] agency, in the exercise of its rulemaking authority, from later adopting some other reasonable and lawful interpretation of the statute."[567] The ratification doctrine "does not mean that the prior construction has become so embedded in the law that only Congress can effect a change," but permits changes "through exercise by the administrative agency of its continuing rule-making power."[568] Because Congress has left the Commission's general rulemaking powers intact, the ratification doctrine – even if properly invoked – would not bar us from exercising those powers to change the method used to define local radio markets and count radio stations for purposes of the local radio ownership rule.

(c) Geography-Based Radio Markets

273. We describe below the modified market definition and counting methodologies we will use to determine compliance with the local radio ownership rule.[569] We conclude that a local radio market that is objectively determined, *i.e.*, that is independent of the radio stations involved in a particular acquisition, presents the most rational basis for defining radio

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[566] *Implementation of Section 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership)*, 11 FCC Rcd 12368, 12370 ¶ 4 (1996).

[567] *McCoy v. United States*, 802 F.2d 762, 766 (4th Cir. 1986).

[568] *Helvering v. Reynolds*, 313 U.S. 428, 432 (1941) (citing *Helvering v. Wilshire Oil Co.*, 308 U.S. 90, 100-101 (1939)); *see also Brock*, 835 F.2d at 916.

[569] Applicants will be required to demonstrate compliance with the rule when filing applications to obtain a new construction permit or license, to assign or transfer an existing permit or license, or to make certain modifications, such as a change in the community of license of a radio station.

markets. We understand that geographic areas are less accurate than contours in measuring the signal reach of individual stations.[570] But radio stations serve people, not land; and while radio signals may overlap over uninhabited land or even water,[571] people in the United States tend to be clustered around specific population centers. The fact that radio signals are not congruent with geographic boundaries does not undermine the logic of relying on geographic areas to define radio markets.

274. As explained below, we will rely on the Arbitron Metro Survey Area (Arbitron Metro) as the presumptive market. We also establish a methodology for counting the number of radio stations that participate in a radio market.[572] We initiate below a new rulemaking proceeding to define radio markets for areas of the country not located in an Arbitron Metro, and we adopt a modified contour-overlap approach to ensure the orderly processing of radio station applications pending completion of that rulemaking proceeding.

(i) Arbitron Metro Survey Areas

275. *Market definition.* Where a commercially accepted and recognized definition of a radio market exists, it seems sensible to us to rely on that market definition for purposes of applying the local radio ownership rule. Arbitron, as the principal radio rating service in the country, has defined radio markets for most of the more populated urban areas of the country. These radio

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[570] *See, e.g.*, Entercom Comments in MM Docket No. 00-244 at 3; NAB Comments in MM Docket No. 00-244 at 11; Viacom Comments in MM Docket No. 00-244 at 3.

[571] *See, e.g.*, Main Street Comments in MM Docket No. 01-317 at 4-6.

[572] We make clear that any radio station that is included in the radio market (*i.e.*, the denominator) under our methodology will also be counted against a station owner's ownership limit in such market (*i.e.*, the numerator). We reject Viacom's argument that we should continue the numerator-denominator inconsistency in geography-based markets. *See* Letter from Anne Lucey, Viacom, to Paul Gallant, Special Advisor, Media Bureau (May 7, 2003) at 1 ("Viacom May 7, 2003 Ex Parte").

markets –Arbitron Metros – are Arbitron's primary survey area, which in turn are based on Metropolitan Areas (MAs) established by the Office of Management and Budget (OMB).[573]

276. The record shows that Arbitron's market definitions are an industry standard and represent a reasonable geographic market delineation within which radio stations compete.[574] Indeed, the DOJ consistently has treated Arbitron Metros as the relevant geographic market for antitrust purposes.[575] Although NAB opposes reliance on Arbitron markets, its own study states that Arbitron's service "is the primary currency through which buyers and sellers of radio airtime negotiate prices for radio advertising in most local markets."[576] As that study states, "all aspects of the information that Arbitron includes in

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[573] MOWG Study No. 11 at 4. MAs are comprised of metropolitan statistical areas (MSAs), consolidated metropolitan statistical areas (CMSAs), and primary metropolitan statistical areas (PMSAs). Metropolitan Areas 1999, Statistical Policy Office, Office of Management and Budget (OMB Metropolitan Areas). CMSAs are comprised of multiple PMSAs. In 2000, OMB revised its procedures for defining MAs. It also adopted a more generic term, Core Based Statistical Area (CBSA), to cover both traditional Metropolitan Areas and the new Micropolitan Statistical Areas ("Micro MSAs") that OMB has defined for less populated areas of the country. *See generally* Standards for Defining Metropolitan and Micropolitan Statistical Areas, 65 Fed. Reg. 82228 (2000). OMB released the updated MA and Micro MSA list, which incorporate the data from obtained the 2000 census, on June 6, 2003. *See* OMB Bulletin 03-04, http://www.whitehouse.gov/omb/bulletins/b03-04.html.

[574] NABOB Comments in MM Docket No. 01-317 at 8. *See also* Eure Comments in MM Docket No. 01-317 at 4; Inner City Comments at 3-4; North American Comments in MM Docket No. 01-317 at 4; UCC Comments in MM Docket No. 01-317 at 12; NABOB *et al.* Comments at 17.

[575] *See*, *supra* note 520.

[576] NAB Comments in MM Docket No. 00-244, Attachment B, *An Analysis of the Proposed Use of Arbitron Data to Define Radio Markets* by David Gunzerath, Ph.D., Director of Survey Research, Research & Planning Dep't, National Association of Broadcasters (Feb. 26, 2001) ("NAB Comments, Gunzerath Report").

these reports," including "the ways in which the markets are defined," are "driven by [the] single goal" of enabling "commercial radio stations and advertisers [to] determine the relative value of radio station airtime."[577] As NABOB succinctly states, "Radio stations compete in Arbitron markets."[578] Given the long-standing industry recognition of the value of Arbitron's service,[579] we believe there is strong reason to adopt a local radio market definition that is based on this established industry standard.[580]

277. Several commenters have argued that Arbitron market definitions are not reliable enough for us to use as a radio market definition.[581] Although Arbitron Metro boundaries do

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[577] NAB Comments in MM Docket No. 00-244, Gunzerath Report at 3.

[578] NABOB Comments at 18.

[579] Arbitron's predecessor was founded in 1966. NAB Comments in Docket No. 00-244, Gunzerath Report at 2.

[580] In approximately five areas, Arbitron Metros are embedded within or overlaps another Arbitron Metro. *Defining Moment in Radio* at 30. If the radio stations at issue in an application are located in such an embedded or overlap area, we will examine each Arbitron Metro separately and will not process the application unless the proposed combination complies with the local radio ownership rule in each Metro implicated by the proposed combination. We believe this approach comports with our general recognition that Arbitron's market definitions are the recognized industry standard. We reject Bear Stearns' proposal that we apply a different test for these markets in which permissible ownership levels would be based on the size and the business plan of the particular group owner. *Id.* at 31-32. We believe such a scheme would be inconsistent with our general reliance on Arbitron's market definition and cumbersome to administer.

[581] *See* NAB Comments in MM Docket No. 01-317 at 35; Cumulus Comments in MM Docket No. 01-317 at 24-25; Cumulus Reply Comments in MM Docket No. 01-317 at 4; WVRC Comments in MM Docket No. 00-244 at 24; Viacom Comments in MM Docket No. 00-244 at 7; NAB Comments in MM Docket No. 00-244 at 16-17; Entercom Comments in MM Docket No. 00-244 at 6; Cumulus Comments in MM Docket No. 00-244 at 5; Aurora Comments in MM Docket No. 00-244 at 8; ARD Reply Comments in MM Docket No. 00-244 at 1; Idaho Wireless Comments in MM Docket No. 00-244 at 6; Brill Comments in MM Docket No. 00-244 at

occasionally change, we are not convinced that such changes occur with such frequency, or that they are so drastic, that we must reject reliance on those boundaries in defining the relevant radio markets. Indeed, as Bear Stearns states, the "self-correcting" nature of Arbitron Metros can be a useful tool for keeping up with "the reality of the marketplace."[582]

278. We believe, moreover, that we can establish safeguards to deter parties from attempting to manipulate Arbitron market definitions for purposes of circumventing the local radio ownership rule. Specifically, we will not allow a party to receive the benefit of a change in Arbitron Metro boundaries unless that change has been in place for at least two years. This safeguard includes both enlarging the Metro (to make a market larger) and shrinking the Metro (to split a party's non-compliant station holdings into separate markets). Similarly, a station combination that does not comply with the rule cannot rely on a change in Arbitron Metro definitions to show compliance and thereby avoid the transfer restrictions outlined in the grandfathering section below, unless that change has been in effect for two years. We also will not allow a party to receive the benefit of the inclusion of a radio station as "home" to a Metro unless such station's community of license is located within the Metro or such station has been considered home to that Metro for at least two years.[583] We believe these

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2; Aurora Comments in MM Docket No. 00-244 at 10.

[582] *Defining Moment in Radio* at 11. Changes in Metro boundaries can occur as a result of population shifts. *Id.* In addition, Arbitron may add a county to a Metro if 55% of the county's radio listening is within the proposed Metro, 15% of the county's residents commute into the proposed Metro, and 75% of Arbitron subscribers agree to the proposed change. *Id.* We believe these standards will help protect against sudden, drastic changes in Arbitron Metro boundaries.

[583] Similarly, a party may not receive the benefit of changing the home status of its own station if such change occurred within the two years prior to the filing of an application. For an explanation of "home" status, see the following paragraphs regarding the counting methodology for Arbitron Metros.

safeguards will ensure that changes in Arbitron Metro boundaries and home market designations will be made to reflect actual market conditions and not to circumvent the local radio ownership rule.[584]

279. *Counting Methodology*. For each Arbitron Metro, Arbitron lists the commercial radio stations that obtain a minimum audience share in the Metro. Some of these stations are designated by Arbitron as "home" to the Metro. These "home" radio stations usually are either licensed to a community within the Arbitron Metro or are determined by Arbitron to compete with the radio stations located in the Metro. These radio stations are also known as "above-the-line" stations because, in ratings reports, Arbitron uses a dotted line to separate these stations from other radio stations – known as "below-the-line" stations – that have historically received a minimum listening share in a Metro.[585]

280. The Commission traditionally has relied on BIA's Media Access Pro database to obtain information about particular Arbitron Metros.[586] The BIA database relies on Arbitron's market definitions and builds upon Arbitron's data to provide greater detail about the competitive realities in Metro markets.[587] Given our experience with the BIA database

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[584] To the extent, of course, that we determine that, despite these safeguards, an Arbitron Metro boundary has been altered to circumvent the local radio ownership rule, we can and will consider that fact in evaluating whether a radio station combination complies with the rule's numerical limits.

[585] Stations that have no reportable audience share in a Metro may remain as a below-the-line station if they historically have received a minimum audience share in the Metro.

[586] See, *e.g.*, *Whitehall Enterprises, Inc.*, 17 FCC Rcd 17509 (2002). BIA is a communications and information technology, investment banking, consulting, and research firm. BIA provides strategic funding, consulting and financial services to the telecommunications, Internet, and media/entertainment industries.

[587] For example, Arbitron counts only commercial stations that meet certain

and its acceptance in the industry, we will count as being in an Arbitron Metro above-the-line radio stations (*i.e.*, stations that are listed as "home" to that Metro), as determined by BIA.[588] We also will include in the market any other licensed full power commercial or noncommercial radio station whose community of license is located within the Metro's geographic boundary.[589] By including these stations in the Metro, our counting methodology will reflect more accurately the competitive reality recognized by the radio broadcasting industry.[590] It is also quite sensible. Because we require radio stations to serve their communities of license, we know that stations licensed to communities in a particular Metro represent a source of competition within that Metro.[591] In addition to

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minimum reporting standards. *See* Letter from Anne Lucey, Viacom, to Paul Gallant, Special Advisor, Media Bureau (May 5, 2003), Attachment at 1 n.4. BIA attempts to include every commercial and noncommercial radio station licensed in each Metro. *Defining Moment in Radio* at 16. BIA also may determine on its own whether a particular station licensed to a community outside of a Metro should be listed as "home" to that Metro. *Id.*

[588] *See, e.g., id.* If the BIA database counts any foreign radio stations as participating in a particular Metro, we also will count those stations in the relevant market. *See id.* at 17; Jefferson-Pilot Comments in MM Docket No. 01-317 at 8-9.

[589] We will rely on the Commission's broadcast database in determining the communities of license of radio stations. In the rare case where the boundaries of a community of license cross a boundary between two radio markets, we will consider the radio stations licensed to that community to participate in both markets.

[590] By counting every radio station that is located in a Metro, we resolve concerns that Arbitron does not include stations that have less than a minimum audience share. *See* WVRC Comments in MM Docket No. 01-317 at 30 n.63, 31; Cumulus Comments in MM Docket No. 01-317 at 25; WVRC Comments in MM Docket No. 00-244 at 24; Cox Comments in MM Docket No. 00-244 at 10; Letter from Jack N. Goodman, NAB, to Michael K. Powell, Chairman, FCC (May 29, 2003) at 2 ("NAB May 29, 2003 Ex Parte").

[591] *See* UCC Comments in MM Docket No. 01-317 at 12-13. NAB claims that a community of license test produces a different market size count than a "home" market test. NAB May 29, 2003 Ex Parte at 2. However, NAB's

serving its community of license, to the extent that a radio station competes beyond that, it is likely to serve the larger outlying metropolitan areas that also comprise Arbitron Metros.[592] Accordingly, we find it is appropriate to count these radio stations in determining the size of an Arbitron Metro.[593]

281. We reject arguments that we should count below-the-line stations in determining the size of a Metro's radio market.[594] Below-the-line stations can be a considerable distance from the Metro, and in many cases serve different population centers, if not altogether different Metros, from

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own data suggest that the market tier would be the same under either test in over 60% of Metros. *Id.*; Attachment. Moreover, our counting methodology appears different from the one NAB used in its analysis. For example, NAB appears to have excluded stations from markets in which their communities of license are located if such stations are home to another Metro. As we explain in the following footnote, we always count a station as participating in the market in which its community of license is located.

[592] It is for this reason that a radio station located outside of a Metro occasionally may be included as home to that Metro. In such cases, we will count that station as participating in the radio market in which its community of license is located in addition to the Metro. We believe this simple rule will help prevent odd results in cases where a station requests "home" status in order to be viewed as a participant in another (usually larger) Metro. *See, e.g., Great Scott Broadcasting*, 17 FCC Rcd 5397, 5406 ¶ 25 (2002) (noting that a radio station that was licensed to Trenton, New Jersey and was the second highest rated station in the Trenton Metro was listed as home to the Middlesex-Somerset-Union Metro); *see also* Viacom May 7, 2003 Ex Parte at 3; NAB May 29, 2003 Ex Parte at 3.

[593] We disagree with commenters contend that contend that the "home" status designation is unreliable. *See, e g.*, Nassau Comments in MM Docket No. 01-317 at 8-9. Because a station will always be considered to participate in the radio market in which its city of license is located, the "home" status designation only affects radio stations licensed outside of the Metro to which it is home. It makes sense to us, moreover, to count those stations in the market in which they are commercially recognized as competitors.

[594] *See, e.g.*, Aurora Comments in MM Docket No. 00-244 at 12; Viacom May 7, 2003 Ex Parte.

radio stations located in the market.[595] NAB estimates that, on average, approximately 70% of radio listening within a market is "attributable to commercial stations listed as being home to that market."[596] Bear Stearns likewise estimates that local radio stations generally capture a disproportionate share of the local markets' listening share and revenue share.[597] Although we recognize that, in certain instances, certain below-the-line radio station may have a competitive impact in the market for radio listening, we believe that, on balance, counting every below-the-line radio station would produce a distorted picture of the state of competition in a particular Metro.[598]

(ii) Areas Not Located in an Arbitron Metro

282. Arbitron Metros do not cover the entire country; the 287 Arbitron Metros cover approximately 60% of the commercial radio stations, 30% of the counties, and 78% of the population

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[595] *See, e.g.*, UCC Comments in MM Docket No. 01-317 at 12-13.

[596] NAB Comments in MM Docket No. 01-317 at 4. We expect that listening to in-market stations is even higher when noncommercial stations are taken into account.

[597] *Defining Moment in Radio* at 12. Bear Stearns states that the mean of audience share and revenue share that the top 3 in-market radio station groups receive is 58.9% and 82.9%, respectively. Bear Stearns concludes that "'out-of-market' players are probably not as significant in competing for local dollars as are 'in-market' players." *Id.* Bear Stearns also notes that "the radio business, more than any other measured media, is a local medium" and that "78% of the radio industry's revenues are derived from local advertisers." *Id.* We have previously observed that local businesses may not find out-of-market radio stations to be adequate substitutes for in-market stations. *See, e.g., Youngstown Radio License, L.L.C.*, 17 FCC Rcd 13896, 13903 ¶ 20 (2002).

[598] This distortion generally can occur in two ways. First, counting every below-the-line station as numerically equal to every in-market station would artificially inflate the size of radio markets. Second, it could unnecessarily restrict consolidation *across* markets because a party's ownership interest in a radio station in one market could also count against that party in an adjacent market solely by virtue of such station obtaining a minimal audience share in the adjacent market. *See Defining Moment in Radio* at 13-14.

above the age of 12 in the United States, including Puerto Rico.[599] Several commenters have raised concerns concerning the appropriate method of defining radio markets in areas of the country not covered by Arbitron Metros.[600]

283. One possibility, in the absence of a pre-defined radio market, is to determine the relevant radio market on a case-by-case basis, in the context of an individual application. Such a process, however, would create significant regulatory uncertainty and impose substantial burdens on small-market radio broadcasters.[601] The better course is to develop radio market definitions for non-Metro areas through the rulemaking process.[602] We believe that would provide the most expeditious way to delineate appropriate radio market boundaries for the entire country and give all interested parties clear guidance about how we will analyze a proposed radio station combination under the local radio ownership rule. Because the rulemaking record in this proceeding provides little information about the appropriate boundaries of specific non-Metro radio markets,[603] we initiate below a new rulemaking proceeding to seek comment on that issue.

284. While that rulemaking proceeding is pending, we will need to process applications proposing radio station

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[599] MOWG Study No. 11 at 4-5 & nn. 6 & 7.

[600] *See, e.g.*, NAB Comments in MM Docket No. 01-317 at 35; WVRC Comments in MM Docket No. 01-317 at 29; Cumulus Reply Comments in MM Docket No. 01-317 at 5; WVRC Comments in MM Docket No. 00-244 at 23; Disney Comments in MM Docket No. 00-244 at 3; Viacom Comments in MM Docket No. 00-244 at 7; NextMedia Comments in MM Docket No. 00-244 at 4; NAB Comments in MM Docket No. 00-244 at 15; Entercom Comments in MM Docket No. 00-244 at 5; Cumulus Comments in MM Docket No. 00-244 at 6; Cox Comments in MM Docket No. 00-244 at 9; Brill Comments in MM Docket No. 00-244 at 2.

[601] *See, e.g.*, Letter from Lewis W. Dickey, President, Cumulus Media, to Michael K. Powell, Chairman, FCC (May 19, 2003) at 2.

[602] NAB May 23, 2003 Ex Parte at 2-3.

[603] *Id.*

combinations in non-Metro areas and determine whether such combinations comply with the local radio ownership rule. Although we find the contour-overlap methodology problematic for the reasons stated above, we conclude that its temporary use during the pendency of the rulemaking proceeding cannot be avoided. Conducting a case-by-case analysis would create significant regulatory uncertainty, and adopting an ill-considered "proxy" geographic market could produce unforeseeable distortions. The contour-overlap methodology is, at a minimum, well understood, and continuing its use for a few additional months would allow for the orderly processing of radio station applications.

285. Although we find it necessary to maintain the contour-overlap market definition for an additional period of time, we will make certain adjustments to minimize the more problematic aspects of that system. Specifically, we adopt NAB's proposal to exclude from the market (*i.e.*, the denominator) radio stations that are commonly owned with the stations in the numerator.[604] This will prevent a party from "piggy-backing" on its own stations to bump into a higher ownership tier. We also will adopt NAB's suggestion that we exclude from the market any radio station whose transmitter site is more than 92 kilometers (58 miles) from the perimeter of the mutual overlap area.[605] This will alleviate some of the gross distortions in market size that can occur when a large signal contour that is part of a proposed combination overlaps the contours of distant radio stations and thereby brings them into the market.

286. We will require parties proposing a radio station combination involving one or more stations whose communities of license are not located within an Arbitron Metro boundary to show compliance with the local radio

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[604] *Id.*

[605] *Id.*

ownership rule using the interim contour-overlap methodology.[606] In making that showing, parties should include in the numerator and denominator radio stations that meet the criteria for inclusion under that methodology (as modified by the preceding paragraph) regardless of whether they are included in Arbitron Metros. We emphasize, however, that the interim contour-overlap methodology may not be used to justify radio station combinations in Arbitron Metros that exceed the numerical limits of the local radio ownership rule; in all cases, parties must demonstrate – using the standards for Arbitron Metros described above – that they comply with those limits in each Metro implicated by the proposed combination.

(iii) Modification to The Local Radio Ownership Rule

(a) Analysis of the Current Numerical Limits

287. Having discussed the relevant product and geographic markets for radio, we now undertake our obligation under Section 202(h) to determine whether the current limits on radio station ownership are necessary to promote the public interest in competition.[607] With respect to the ownership tiers, we conclude that the current rule meets that standard. We find, however, that the rule improperly fails to consider the effect that noncommercial stations can have on competition in the local radio market. We accordingly modify the rule to count noncommercial radio stations in determining the size of the radio market.

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[606] The interim methodology will be triggered even if a radio station is "home" to an Arbitron Metro, as long as its community of license is located outside of the Metro.

[607] Although the numerical limits in the local radio ownership rule traditionally have been focused on ensuring "Local Radio Diversity," *see* 1996 Act, § 202(b), we rely primarily on our competition goal to justify the rule. *See Fox Television*, 280 F.3d at 1042.

288. We conclude that the ownership tiers in the current rule represent a reasonable means for promoting the public interest as it relates to competition. In radio markets, barriers to entry are high because virtually all available radio spectrum has been licensed. Radio broadcasting is thus a closed entry market, *i.e.*, new entry generally can occur only through the acquisition of spectrum inputs from existing radio broadcasters.[608] The closed entry nature of radio suggests that the extent of capacity that is available for new entry plays a significant role in determining whether market power can develop in radio broadcasting. Numerical limits on radio station ownership help to keep the available capacity from becoming "locked-up" in the hands of one or a few owners, and thus help prevent the formation of market power in local radio markets.

289. Although competition theory does not provide a hard-and-fast rule on the number of equally sized competitors that are necessary to ensure that the full benefits of competition are realized, both economic theory and empirical studies suggest that a market that has five or more relatively equally sized firms can achieve a level of market performance comparable to a fragmented, structurally competitive market.[609] The current tiers ensure that, in markets with between 27 and 51 radio stations, there will be approximately five or six radio station

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[608] The need for governmental approval also imposes costs on new entry into the market.

[609] A game-theoretic analysis of the number of independent firms that are required to produce competitive market performance is provided by R. Selter, *A Simple Model of Imperfect Competition Where Four are Few and Six are Many*, INT'L J. GAME THEORY 2 (1973). This model is presented more intuitively in Louis Phillips, COMPETITION POLICY: A GAME THEORY PERSPECTIVE Ch. 2 (Cambridge, UK: Cambridge Univ. Press 1995). An empirical study which finds that additional market entry has little effect on market conduct once a market has between three and five firms is provided by Timothy F. Bresnahan and Peter C. Reiss, *Entry and Competition in Concentrated Markets*, 99 J. OF POL. ECON. 997-1009 (1991). These limits roughly comport with the limit in the DOJ/FTC Merger Guidelines between moderately- and highly-concentrated markets. *DOJ/FTC Guidelines* § 1.51.

firms of roughly equal size.[610] An analysis of the top 100 Metro markets indicates that many of them fall within this range.[611]

290. We find that the concentration levels permitted by the current rule represent a reasonable and necessary balance for radio broadcasting that comports with general competition theory, and we decline to relax the rule to permit greater consolidation in local radio markets. We acknowledge that many radio markets currently have more than 6 radio station firms. According to MOWG Study No. 11, the top 50 Metros have an average of 19.9 radio station owners, the next 50 Metros have an average of 11.4 owners, and the remaining Metros have an average of 6.7 owners.[612] We also consider, however, that radio stations are not all equal in terms of their technical capabilities (*i.e.*, each radio station covers a population with varying levels of signal quality), and that the technical differences among stations can cause radio stations groups with similar numbers of radio stations to have vastly different levels of market power. Thus, although the top 50 Metros have an average of 19.9 owners, the top station group in each of those Metros has, on average, 35.2% of the revenue share, and the top four groups receive, on average, 86.1% of the revenue share.[613] The top four firms also dominate audience share.[614] According to the Future of Music Coalition, the top

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[610] Markets with 27 radio stations must have at least 4.5 owners (27 stations divided by the 6 station limit). Markets with 51 radio stations must have at least 6.375 owners (51 stations divided by 8 station limit).

[611] *Defining Moment in Radio* at 21. Our own analysis of BIA data confirms this conclusion.

[612] MOWG Study No. 11, App. D.

[613] *Id.* In Metros 51 to 100, the average revenue shares for the top firm and the four top firms are 42.8% and 93.5%, respectively. In Metros 101-287, the figures are 50.9% and 95%, respectively.

[614] The radio stations that receive the highest audience shares tend to receive a disproportionate portion of the revenue shares. *See Defining Moment for Radio* at 12; *see also* Arbitron, Radio's Leading Indicator: Audience ratings

four firms receive 77.1% of the audience share in the top 10 Metros, 84.7% in Metros 11 to 25, and 85.8% in Metros 26-50.[615] Bear Stearns' analysis also shows that, in the top 100 radio markets, the top three radio groups receive a median of 82.9% of the revenue share and 58.9% of the audience share.[616] And MOWG Study No. 4 indicates that the increase in concentration in radio markets has resulted in an appreciable, albeit small, increase in advertising rates.[617] This data suggests that the current numerical limits are not unduly restrictive.[618]

291. For markets with more than 51 radio stations, the number of radio station firms ensured by the rule increases as the size of the market increases. Because of this, some parties argue that we should raise the numerical limits to permit common ownership of more than eight radio stations in larger markets.[619] We reject that argument. There is no evidence in the record that indicates that the efficiencies of consolidating radio stations increase appreciably for combinations involving more than eight radio stations.[620] On the other hand, extremely

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and the impact on revenue, available at http://www.arbitron.com/downloads/leadindicator2002.pdf.

[615] FMC Comments at 33. The audience share of the top four firms in markets 51-100 and 101-289 is 92.5% and 93.9%, respectively. *Id.*

[616] *Defining Moment in Radio* at 12.

[617] MOWG Study No. 4 at 18.

[618] We see no significant benefit in tinkering with the basic structure of the tiers. *See, e.g.*, Hodson Comments in MM Docket No. 01-317 at 7 (proposing six-tier framework). Bear Stearns argues that we should adjust the tiers because, in its view, Arbitron Metro markets contain on average fewer stations than the current contour-overlap markets. *Defining Moment in Radio* at 21-25. We reject that argument. The purpose of developing a sound market definition methodology is to enable us to measure concentration levels more accurately. We do not see why that should affect the level of concentration we permit in a (properly defined) market.

[619] *See Defining Moment in Radio* at 21-22; Viacom May 5, 2003 Ex Parte at 11.

[620] No party contends that radio broadcasting is a natural monopoly, *i.e.*, that

large radio markets tend to cover a large area geographically and also tend to be more "crowded" in terms of radio signals. As a result, large markets may include a greater number of extremely small radio stations, as well as radio stations that are a significant distance from each other.[621] Both of these phenomena may make a large market appear more competitive than it actually is.[622] For example, there are approximately 84 radio stations (52 FM and 27 AM) licensed to the Los Angeles Metro. Of the FM stations, twenty-three are Class A or Class D stations, the weakest classes of FM stations. Of the 27 AM stations in Los Angeles, only five are 50 kilowatts and three are 20 kilowatts. The remaining 19 AM stations include one 10 kilowatt station and 18 stations with a power of 5 kilowatts or less. Some of these technically weaker stations may, of course, be strong competitors in their markets, depending on a variety of factors such as format choice, population coverage, and quality of programming.[623] But even in Los Angeles, the second largest radio market in the nation, the top one, two, and

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one firm can always provide service more efficiently than two or more firms.

[621] *See, e.g.*, NextMedia Comments in MM Docket No. 00-244 at 5; *accord* Letter from Jeffrey H. Smulyan, Chairman and CEO, Emmis Communications to Michael K. Powell, Chairman, FCC (May 30, 2003); Letter from Lee J. Peltzman, Shainis and Peltzman, to Marlene H. Dortch, Secretary, FCC (May 7, 2003) (Peltzman May 7, 2003 Ex Parte Letter).

[622] In addition to our decision to cap radio station ownership at 8 stations, we take the technical differences of radio stations into account by maintaining separate AM and FM limits.

[623] It is for this reason that we cannot agree with certain commenters' arguments that we should allow greater consolidation of less powerful radio facilities in a local market. *See, e.g.*, Letter from John S. Logan, Dow, Lohnes & Albertson, to Marlene H. Dortch, Secretary, FCC (May 15, 2003); Letter from Linda G. Morrison, Leventhal, Senter & Lerman, to Marlene H. Dortch, Secretary, FCC (May 28, 2003); NextMedia Comments in MM Docket No. 00-244 at 4-5. The local radio ownership rule takes into account differences in power and class of radio stations where appropriate. We see no feasible way to account for unique market conditions or individual company holdings without frustrating our goal of providing regulatory certainty through relatively simple, bright-line rules.

four radio station firms receive 31.2%, 60.2%, and 76.1%, respectively, of the revenue share.[624] By capping the numerical limit at eight stations, we seek to guard against consolidation of the strongest stations in a market in the hands of too few owners and to ensure a market structure that fosters opportunities for new entry into radio broadcasting.[625]

292. We also decline to make the numerical limits more restrictive. In the smallest radio markets, the current rule provides that one entity may own up to half of the commercial radio stations in a market. Although this would be considered highly concentrated from a competitive point of view, the Commission has recognized that greater levels of concentration may be needed to ensure the potential for viability of radio stations in smaller markets.[626] Given these concerns, we find it reasonable to allow greater levels of concentration in smaller radio markets, but to require more independent radio station owners as the size of the market increases and viability concerns become less acute.

293. In analyzing the level of concentration in radio markets that would be consistent with the public interest, we seek both to ensure a healthy, competitive radio market and enable radio owners to achieve significant efficiencies through consolidation of broadcast facilities. Prior to 1992, the local radio ownership rule did a poor job of recognizing that a certain level of consolidation can be efficient. Given the generally difficult economic conditions at the time, the inability of stations to seek efficiencies through consolidation may have contributed to the industry's financial difficulties. We do not seek to undermine the benefits that consolidation has brought to the financial stability of the radio industry; we seek to ensure that such

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[624] MOWG Study No. 11, App. F.

[625] *See infra* ¶¶ 296-301.

[626] *See 1992 Radio Ownership Order*, 7 FCC Rcd at 2777 (competitive realities are substantially different in markets of different sizes). *See also* Cumulus Comments in MM Docket No. 01-317 at 18-20.

consolidation does not reach the point of stifling competitive incentives. Because we believe that the current numerical limits by and large strike the appropriate balance,[627] we reaffirm those limits.

294. We also reaffirm the AM and FM ownership limits in the current rule. Eliminating the service limits would improperly ignore the significant technical and marketplace differences between AM and FM stations. AM stations have significantly less bandwidth than FM stations, and the fidelity of their audio signal is inferior to that of FM stations.[628] Unlike FM stations, moreover, AM signal propagation also varies with time of day. During the day, AM signals travel through ground currents for between 50 to 200 miles; at night, AM signals travel further because they are reflected from the upper atmosphere. As a result, "many AM stations are required to cease operation at sunset."[629] These and other technical differences[630] have an effect on radio listenership patterns. As of 2002, 82% of radio audience comes from the FM service,

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[627] *See Sinclair*, 284 F.3d at 162; *AT&T Corp. v. FCC*, 220 F.3d 607, 627 (D.C. Cir. 2000) (the Commission "has wide discretion to determine where to draw administrative lines"); *Cassell v. FCC*, 154 F.3d 478, 485 (D.C. Cir. 1998) (the Commission's line-drawing is entitled deference so long as it is not "patently unreasonable"); *Health and Medicine Policy Research Group v. FCC*, 807 F.2d 1038, 1043 (D.C. Cir. 1987) ("the scope of review is particularly limited when the FCC engages in 'the process of drawing lines'"); *Hercules Inc. v. EPA*, 598 F.2d 91, 107-108 (D.C. Cir. 1978) (agency's numbers must only be within a "zone of reasonableness").

[628] *See Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service*, 17 FCC Rcd 19990, 19997 ¶ 19 (2002). The development of in-band, on-channel technology may help AM stations overcome this limitation. *See id.*

[629] *Id.*

[630] *See generally Review of Technical Assignment Criteria for the AM Broadcast Service*, 2 FCC Rcd 5014 (1987); *Review of Technical Assignment Criteria for the AM Broadcast Service*, 5 FCC Rcd 4381 (1990); *Review of the Methods for Calculating Nighttime Protection for Stations in the AM Broadcast Service*, 3 FCC Rcd 6448 (1988).

while 18% of radio audience comes from the AM service.[631] Radio formats also can be affected. In Los Angeles, for example, our analysis indicates that many of the AM stations have a news/talk/sports or ethnic format, while music formats are more likely on commercial FM stations. We cannot agree, therefore, that eliminating the service caps and treating AM and FM radio stations equally for purposes of the overall station limit is consistent with our interest in protecting competition in local radio markets.

295. Although we reaffirm the ownership tiers in the local radio ownership rule, we conclude that it is not necessary in the public interest to exclude noncommercial radio stations in determining the size of the radio market. Although noncommercial stations do not compete in the radio advertising market, they compete with other radio stations in the radio listening and program production markets.[632] Indeed, noncommercial stations can receive a significant listening share in their respective markets.[633] Their presence in the market therefore exerts competitive pressure on all other radio stations in the market seeking to attract the attention of the same body of potential listeners. In television, we have recognized the contribution that noncommercial stations can make to competition by counting noncommercial stations in determining

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631 *See* Arbitron National Radio Services, Tracking Trends at http://www.Arbitron.com/national_radio/home.htm (visited May 11, 2003); *see also* Peltzman May 7, 2003 Ex Parte at 1. Viacom argues that "four of the ten highest billing stations in the country are AM stations." *See* Letter from Meredith Senter, Levanthal, Senter & Lerman, to Marlene H. Dortch, Secretary, FCC (May 15, 2003) at 3. We fail to see how looking at only the top ten billing stations provides much information about the relative strength of AM and FM stations across the country. To the contrary, the fact that a few high-power AM stations are comparable to FM stations in terms of billing capability weighs against Viacom's alternative argument that we should disregard AM ownership entirely. *Id.*

632 *See, e.g.*, Viacom May 5, 2003 Ex Parte at 4.

633 *See, e.g.*, Viacom May 7, 2003 Ex Parte at 2.

the size of the television market. We see no reason to treat noncommercial radio stations differently.

(b) Rejection of Repeal and Other Modifications

296. We reject arguments that we should repeal the local radio ownership rule. We see nothing in the record that persuades us that the acquisition of market power in radio broadcasting serves the public interest.[634] As we explain in the Policy Goals section, we are committed to establishing a regulatory framework that promotes competition in the field of broadcasting. Competition breeds innovation in programming and creates incentives to continually improve program quality.[635] Because competition – and the benefits that flow from it – is lessened when the market is dominated by one or a few players, we seek through our rules to prevent that type of market structure from developing.

297. Without some check, a party could acquire all or a significant portion of the limited number of broadcast radio channels in a local community, leaving listeners, advertisers, and program producers with fewer substitutes. That situation also would raise the cost of entry into the market by new entrants because there would be fewer radio stations available from which a party could construct a competing station group.[636] Because the most potent sources of innovation often

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[634] Most of the debate centers around whether radio broadcasting constitutes a separate relevant product market (we have concluded that it does) and the means we should use to protect competition in the relevant market (we have just answered that question). Although some parties have suggested that monopoly in broadcasting would promote program diversity, we find the evidence supporting that theory inconclusive. *See infra* ¶¶ 307-315.

[635] *See, e.g., EchoStar/DirecTV HDO*, 17 FCC Rcd at 20626 ¶ 176. *See also* Policy Goals, Section III, *supra*.

[636] *See* Dick Comments in MM Docket No. 01-317 at 6; Hodson Comments in MM Docket No. 01-317 at 6.

arise from new entrants,[637] a market structure that significantly raises the costs of entry leads to less-than-optimal results in terms of innovation and program quality and thereby harms the public interest.[638] It is therefore necessary for us to impose limits on the number of radio stations a party may own in a local market to preserve competition in the relevant markets in which radio stations compete.[639]

298. Several commenters argue that the local radio ownership rule is unjustified because consolidation has resulted in efficiencies and has produced significant public interest benefits.[640] In the *Local Radio Ownership NPRM*, we asked for information on three specific markets – Syracuse, New York; Rockford, Illinois; and Florence, South Carolina. Clear Channel is the largest group owner in Syracuse;[641] Cumulus is a large group owner in Rockford and Florence.[642] Clear Channel and Cumulus have provided detailed information highlighting the public interest benefits that they contend they have produced by consolidating radio stations in those markets, such as greater investment in facilities and programming, including local news and public affairs.[643]

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[637] *See, e.g., 1998 Biennial Regulatory Review – Testing New Technology*, 14 FCC Rcd at 6077 ¶ 28; *see also* MMTC Comments in MM Docket No. 01-317 at 107.

[638] *See* Policy Goals, Section III, *supra*.

[639] *Id.* Contains explanation of why we decide to rely on prescriptive rules rather than case-by-case analyses to promote our public interest objectives in media.

[640] *See, e.g.*, Viacom Comments in MM Docket No. 01-317 at 51, 60-63; Clear Channel Comments in MM Docket No. 01-317 at 23-24.

[641] Clear Channel Comments in MM Docket No. 01-317 at 24.

[642] Cumulus Comments in MM Docket No. 01-317 at 7.

[643] Clear Channel Comments in MM Docket No. 01-317, Exh. 4; Cumulus Comments in MM Docket No. 01-317 at 6-14; Cumulus Comments at 7-12. Clear Channel also filed similar information about other radio markets in which it operates. Clear Channel Comments in MM Docket No. 01-317,

299. We do not dispute that a certain level of consolidation of radio stations can improve the ability of a group owner to make investments that benefit the public.[644] Our responsibility under the statute, however, is to determine the level at which the harms of consolidation outweigh its benefits, and to establish rules to prevent that situation from developing. And while Clear Channel, Cumulus, and others highlight the public interest benefits that they were able to achieve through consolidation, we also seek to ensure that radio stations outside of the dominant groups can remain viable and, beyond that, can prosper. Several commenters express concern that, in markets with a high level of concentration, small radio firms may be forced to "sell out" to group owners.[645] Specifically, the concern is that, in a concentrated market, dominant radio station groups can exercise market power to attract revenue at the expense of the small owner.[646] As a result, the small owner has greater difficulty obtaining the revenue it needs to develop and broadcast attractive programming and to compete generally against the dominant station groups.[647] Although we decline to

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Exh. 5.

[644] *See, e.g.*, NAB Comments in MM Docket No. 01-317 at 44-45; Radio One Comments in MM Docket No. 01-317 at 11-12; Viacom Comments in MM Docket No. 01-317 at 60-62; Clear Channel Comments in MM Docket No. 01-317 at 23-24; Cumulus Comments in MM Docket No. 01-317 at 5-6, 19; Zimmer Comments in MM Docket No. 00-244 at 6; Weigle Comments in MM Docket No. 00-244 at 6; Viacom Comments in MM Docket No. 00-244 at 6; HBC Comments in MM Docket No. 01-317 at 11-12; NAB Reply Comments in MM Docket No. 01-317 at 11; Zimmer Comments in MM Docket No. 00-244 at 7.

[645] *See* AFTRA Comments in MM Docket No. 01-317 at 2; North American Comments in MM Docket No. 01-317 at 12; Blakeney Comments in MM Docket No. 01-317 at 2; MMTC Comments in MM Docket No. 01-317 at 23-24, 45.

[646] *See* North American Comments in MM Docket No. 01-317 at 11; Idaho Comments in MM Docket No. 01-317 at 3; Dick Comments in MM Docket No. 01-317 at 3; MMTC Comments in MM Docket No. 01-317 at 21.

[647] *See* AFTRA Comments in MM Docket No. 01-317 at 9; Daugherty

pass on the competitive situation in any particular radio market in the context of this rulemaking proceeding,[648] the concerns raised by these commenters comport with the competition analysis that underlies this order and supports our decision not to repeal the local radio ownership rule.

300. We also reject arguments that we incorporate a market share analysis into the local radio ownership rule or that we continue to "flag" applications that propose radio station combinations above a certain market share.[649] Several parties have suggested that we consider audience share or revenue share in determining the level at which common ownership of local radio stations becomes contrary the public interest.[650] We recognize that competition analysis generally looks to market share as the primary indicator of market power. Market share, however, must be considered in conjunction with the overall structure of the industry in determining whether market power

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Comments in MM Docket No. 01-317 at 3; Kennelwood Comments at 1-3.

[648] *See, e.g.*, Kennelwood Comments at 8.

[649] In August 1998 the Commission began "flagging" public notices of radio station transactions that, based on an initial analysis by the staff, proposed a level of local radio concentration that implicated the Commission's public interest concern for maintaining diversity and competition. *See* Broadcast Applications, Rep. No. 24303 (Aug. 12, 1998). Under this policy, the Commission flagged proposed transactions that would result in one entity controlling 50% or more of the advertising revenues in the relevant Arbitron radio market or two entities controlling 70% or more of the advertising revenues in that market. *See Applications of Shareholders of AMFM, Inc., (Transferor) and Clear Channel Communication, Inc. (Transferee)*, 15 FCC Rcd 16062, 16066 ¶ 7 n.10 (2000) ("*AMFM, Inc.*"). Flagged transactions were subject to a further competitive analysis, the scope of which is embodied in the interim policy set forth in the *Local Radio Ownership NPRM*, 16 FCC Rcd at 19894-97 ¶¶ 84-89.

[650] *See, e.g.*, Hodson Comments in MM Docket No. 01-317 at 6-7; UCC Comments in MM Docket No. 01-317 at 27; NABOB Comments in MM Docket No. 01-317 at 5; Radio One Reply Comments in MM Docket No. 01-317 at 3; Cumulus Comments at 14.

is present.[651] In radio, the availability of a sufficient number of radio channels is of particular importance in ensuring that competition can flourish in local radio markets. The numerical caps and the AM/FM service limits are designed to address that interest, and in our judgment, establishing a inflexible market share limit in our bright-line rule would add little, if any, benefit. We do not seek to discourage radio firms from earning market share through investment in quality programming that listeners prefer; our objective is to prevent firms from gaining market dominance through the consolidation of a significant number of key broadcast facilities. We do not believe that developing a market share limit would significantly advance that objective.

301. We recognize that our conclusion differs from the Commission's view in 1992 that an audience share cap was necessary "to prevent consolidation of the top stations in a particular local market."[652] But the audience share cap was never intended to be more than a "backstop" to the new numerical limits the Commission had established, which for the first time allowed a party to own multiple radio stations in a local market.[653] The audience share cap was eliminated as a result of the revisions to the local radio ownership rule that Congress mandated in the 1996 Act, which left only the numerical caps in place. But because of the problems associated with the contour-overlap market definition and counting methodologies, we could not rely with confidence on those numerical limits to protect against undue concentration in local markets. As a result, we began looking at revenue share in our "flagging" process and the interim policy that we established in the *Local Radio Ownership NPRM*. Now that we have established a rational system for defining radio markets

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[651] *See, e.g., United States v. Microsoft Corp.*, 235 F.3d 34, 51, 54 (D.C. Cir. 2001); *TV FNPRM*, 10 FCC Rcd at 3535 ¶ 21.

[652] *1992 Radio Ownership Order*, 7 FCC Rcd at 2781 ¶ 53.

[653] *Id.*

and counting market participants, we believe that the numerical limits will be better able to protect against harmful concentration levels in local radio markets that might otherwise threaten the public interest. To the extent an interested party believes this not to be the case, it has a statutory right to file a petition to deny a specific radio station application and present evidence that makes the necessary *prima facie* showing that a proposed combination is contrary to the public interest.[654]

b. Localism

302. Our localism goal stems from our interest in ensuring that licensed broadcast facilities serve and are responsive to the needs and interests of the communities to which they are licensed.[655] Our localism policy influences many of our broadcast policy decisions, including decisions relating to how radio spectrum is allocated and to the public interest obligations that are imposed on radio broadcasters.[656]

303. Some commenters argue that the local radio ownership rule harms localism by preventing efficient consolidation that promotes improved local service. As explained in the Competition Section above, we agree that consolidation of radio stations can result in efficiencies. This does not mean, however, that all consolidation serves the public interest.[657] We recognize only those efficiencies that inure to the benefit of the public.[658] In a competitive market, the efficiencies arising out of consolidation will be passed on to listeners through greater innovation and improved service quality, which in this context contemplates programming that is responsive to the needs and interests of the local community. In a concentrated market,

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[654] 47 U.S.C. § 309(d).

[655] *Notice*, 17 FCC Rcd at 18526 ¶ 70.

[656] *Id.*

[657] *See 2000 CMRS Review*, 16 FCC Rcd at 22696 ¶ 55.

[658] *See, e.g., Whitehall Enterprises, Inc.*, 17 FCC Rcd at 17525 ¶ 49. *Accord EchoStar/DirecTV HDO*, 17 FCC Rcd at 20604 ¶ 98.

radio station firms have diminished incentive to compete vigorously. Smaller firms, moreover, may have insufficient resources to compete aggressively with the dominant firms in the market, which makes smaller firms less effective in meeting the needs and interests of their local communities. Thus, by preserving a healthy, competitive local radio market, the local radio ownership rule also helps promote our interest in localism.

304. Aside from the positive effect on localism that ensues from a competitive radio market, we see little to indicate that the local radio ownership rule significantly advances our interest in localism. In prior rulemaking proceedings, the Commission has not emphasized localism as one of the justifications for the local radio ownership rule,[659] and the record suggests no reason for adopting a different view here. Although some parties suggest that localism has suffered as a result of consolidation, the source of the alleged harm appears to be the overall *national* size of the radio station group owner rather than the number of radio stations commonly owned in a local market. Thus, Idaho Wireless contends that large group owners downsize local staff so that "they can run stations all over the country more cheaply,"[660] and UCC asserts that consolidation has resulted in "nearly identical programming" in *different* local markets.[661] These concerns do not address whether consolidation of radio stations in a *local* market would harm localism. National radio ownership limits are outside the scope of this proceeding.

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[659] *See, e.g., 1992 Radio Ownership Order*, 7 FCC Rcd 2755; *1989 Multiple Ownership First Report and Order*, 4 FCC Rcd 1723.

[660] Idaho Wireless Comments in MM Docket No. 01-317 at 3, 9-10; *see also* North American Comments in MM Docket No. 01-317 at 11.

[661] UCC Reply Comments in MM Docket No. 01-317 at 17.

c. Diversity

305. *Viewpoint Diversity.* Viewpoint diversity "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[662] Many outlets contribute to the dissemination of diverse viewpoints, and provide news and public affairs programming to the public. Elsewhere in this *Order*, we discuss in exacting detail the various sources of local news and information that are available to the public. Here, it is sufficient to say that media other than radio play an important role in the dissemination of local news and public affairs information.

306. That, of course, does not mean that radio broadcasting is irrelevant to viewpoint diversity. We recognize that radio can reach specific demographic groups more easily than other forms of mass media.[663] Because of this, and because of its relative affordability compared to other mass media, radio remains a likely avenue for new entry into the media business, particularly by small businesses, women, minorities, and other entrepreneurs seeking to meet a market demand or provide programming to underserved communities. New entry promotes outlet diversity, which in turn enhances viewpoint diversity and the public interest. Our competition-based limits on local radio ownership thus promote viewpoint diversity, not only by ensuring a sufficient number of independent radio voices, but also by preserving a market structure that facilitates and encourages entry into the local media market by new and underrepresented parties.

307. *Programming Diversity.* Some commenters argue that program diversity should be the paramount diversity concern in radio broadcasting.[664] The record is divided on the effect of

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[662] *Associated Press v. United States*, 326 U.S. 1 (1945).

[663] *See* MMTC Comments in MM Docket No. 01-317 at 47.

[664] *See, e.g.*, NAB Comments in MM Docket No. 01-317 at 16; Clear

consolidation on program diversity. Some argue that the local radio ownership rule harms program diversity because greater concentration leads to more homogenized, less innovative programming.[665] Others argue that the rule encourages program diversity because greater concentration encourages the common owner to program in a manner that appeals to different audiences.[666]

308. In theory, program diversity promotes the public interest by affording consumers access to a greater array of programming choices. We have long recognized that the most extreme example of zero program diversity – duplication of programming – generally results in an inefficient use of the scarce radio spectrum and a lost opportunity to use that spectrum to serve a community. For that reason, our rules restrict the ability of radio broadcasters to duplicate programming in the same community.[667] The corollary is that greater variety of differentiated programming advances the public interest by giving consumers in a local community more selection from which they can obtain programming to meet their varied interests.

309. No party seriously disputes that greater program diversity promotes the public interest. The difficulty is in finding a way to measure program diversity in a coherent and consistent manner so that we can determine how it is affected by concentration.[668] The record indicates that different

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Channel Comments in MM Docket No. 01-317 at 14.

[665] AFTRA Comments in MM Docket No. 01-317 at 11; Hodson Feb. 28, 2002, Comments at 5-6; Amherst Comments in MM Docket No. 01-317 at 3.

[666] NAB Comments in MM Docket No. 01-317 at 18-20; Radio South Comments in MM Docket No. 01-317 at 2; Clear Channel Reply Comments in MM Docket No. 01-317 at 3; NAB Reply Comments in MM Docket No. 01-317 at 12; Zimmer Comments In MM Docket No. 00-244 at 6; Citadel Comments in MM Docket No. 00-244 at 8.

[667] 47 C.F.R. § 73.3556.

[668] The relationship between concentration and program diversity is not

measures of format diversity produce strikingly different results.

310. A number of commenters cite a recent study by Berry and Waldfogel that found that reductions in the numbers of owners in radio markets led to an increase in radio format labels.[669] This confirms, they argue, Steiner's claim that a monopoly broadcaster will provide more diverse programming than a number of competitive stations.[670] The evidence presented in MOWG Study No. 11, however, suggests that the number of formats across radio markets has remained flat since the passage of the 1996 Act.[671] The discrepancy between these two studies is due to the different classification of format used in each study. MOWG Study No. 11 uses the most general type of classification available in the BIA database, while Berry and Waldfogel uses the finer classification formats available in Duncan. An example will illustrate the difference. One radio format Adult Contemporary taken from the BIA can be broken down into five different subformats under Duncan's system: Adult Contemporary, Adult Contemporary/Album Oriented Rock, Adult Contemporary/Contemporary Hit Radio, Adult Contemporary/ New Rock, and Adult Contemporary Oldies. While we agree that the Duncan formats allow a somewhat richer portrayal of the variety of music than the more general format categories, we are not certain how substantial the difference between many of these minor subcategories within

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necessarily linear. One study examining the relationship between industry structure and variety in the music recording industry found that high and low levels of concentration result in less variety, while maximum variety is promoted at a moderately concentrated structure. In this study, that moderate concentration level corresponded with the top four firms capturing approximately half the market revenue. *See* Peter J. Alexander, Product Variety and Market Structure, 32 J. ECON. BEHAVIOR & ORG. 207 (1997).

669 Steven Berry and Joel Waldfogel, *Do Mergers Increase Product Variety? Evidence from Radio Broadcasting*, 116(3) Q. J. ECON. 1009-25.

670 Steiner, *supra* note 403. *See infra* ¶¶ 313-14.

671 MOWG Study No. 11.

the major categories of format are. We therefore question how well the increases in radio formats reported by Berry and Waldfogel imply increases in radio program diversity.

311. The relationship between radio formats and radio programming is investigated in a study by Peter DiCola and Kristin Thomson.[672] By searching through playlist data in *Radio and Records*, they found substantial overlap between the major radio formats. For example, they found that in August 2002, that Contemporary Hit Rock (CHR) Rhythmic and Urban shared 76% of the songs on their top 50 charts.[673] Further, they found that the overlap had increased for some music format pairs and decreased for others.[674] The considerable overlap between major format categories reported by DiCola and Thomson suggest far greater overlap between the Duncan formats which Berry and Waldfogel use. The presence of substantial overlap between music formats that do not remain stable through time suggests that the number of formats is not a good measure of program diversity.

312. MOWG Study No. 9 addresses the issue of diversity in radio by examining top 10 playlists across a sample of radio stations published by *Radio and Records*.[675] Overall, the results suggest that song diversity remained approximately flat from 1996 to 2001. MOWG Study No. 9 compared the total number of unique songs in top 10 playlists between 1996 and 2001 and found the number of songs changed from 1241 to 1228, a 1 percent decline.[676] MOWG Study No. 9 also

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[672] Future of Music Coalition Comments, *Radio Deregulation: Has It Served Citizens and Musicians?* by Peter DiCola and Kristin Thomson.

[673] Future of Music Coalition Comments at Table 4-1, at 56.

[674] For example, overlap in Top 50 charts for CHR Pop and CHR Rhythmic has increased by 14% from 1994 and 2002. *Id* at Table 4-2, at 60.

[675] MOWG Study No. 9, Radio Market Structure and Music Diversity by George Williams, Keith Brown, and Peter Alexander (Sept. 2002) ("MOWG Study No. 9").

[676] *Id.* at 9.

constructed a measure to compare the difference of the top 10 songs played between radio stations.[677] The authors found that comparing stations within the same format led to an overall decline of 2.4% in top 10 playlist diversity.[678] A similar exercise, however, comparing radio stations in similar but different formats found a slight increase in diversity of 0.74%.[679] The study also attempted to establish the direct link of songlist diversity and consolidation in the radio industry. Overall, the results suggest that consolidation in the radio industry neither helped nor hindered playlist diversity between radio stations.[680]

313. The studies on program diversity also do not draw a sufficiently reliable causal link between ownership concentration and the purported increase in format diversity. To establish that link, some commenters rely on the theory proposed by Peter Steiner in 1952 that a monopoly broadcaster will diversify programming to attract different groups with distinct listening preferences and thereby secure the largest total audience for advertisers, whereas broadcasters operating in a competitive environment would be more likely to duplicate formats if a majority of listeners prefer a particular format.

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[677] The technical details of this difference measure are described in the paper, but essentially the measure counts the number of times two different playlists do not share a song. Thus if the top 10 songs of two stations share 4 songs, the distance measure would equal 6.

[678] MOWG Study No. 9 at 11.

[679] *Id.* at 13.

[680] MOWG Study No. 9 also attempted to establish the direct relationship between consolidation of radio stations in a market and the songlist diversity in that market through linear regression. The results reported suggest that common ownership of radio stations in a market can increase playlist diversity. Unfortunately, inspection of the data suggest that this result may not be very robust. The number of common radio stations in issues of *Radio and Records* examined between 1996 and 2001 is so few that that the result is driven by only a handful of radio station pairs. This remains to be an important question for further research.

According to these commenters, the Steiner theory supports the causal link between the increase in radio ownership concentration over the last few years and the asserted increase in format diversity.[681]

314. Steiner's theory has produced much discussion and research in the economic literature,[682] and the Commission has itself recognized the theory that greater consolidation could lead to greater format diversity.[683] After a careful review of the economic literature, however, we cannot confidently adopt the view that we should encourage more consolidation in order to achieve greater format diversity. Like many economic theories, the Steiner theory and its progeny rests on a number of assumptions. The ability of the theory to predict actual market results reliably therefore depends in large part on the accuracy of those assumptions. For example, Steiner assumes that viewers prefer only one type of programming; when viewers have lesser preferred substitutes, different results are produced. Moreover, competitive models perform better than monopoly in terms of diversity and consumer welfare when channel space increases.[684] Changes in various other assumptions also may affect the results reached by the original Steiner model.[685] We need not review all of these assumptions here; it is sufficient that they exist and that their accuracy is open to debate. Although further research on the Steiner model may be fruitful,

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[681] *See, e.g.*, Clear Channel Comments, Hausman Statement at 12.

[682] Jack H. Beebe, in particular, has used the Steiner model to create a significantly more sophisticated model of program choice in broadcasting. Jack H. Beebe, *Institutional Structure and Program Choices in Television Markets*, 91(1) Q. J. ECON. 15 (1977).

[683] *Notice*, 17 FCC Rcd at 18530 ¶ 82 n.159.

[684] Beebe, *supra* note 685 at 15.

[685] For example, taking advertising into account may change the results of the Steiner model. *See* Simon Anderson and Steve Coate, *Market Provision of Public Goods: The Case for Broadcasting*, Working Paper (UVA and Cornell 2001).

we cannot at this time rely on that model to accept the argument that greater consolidation leads to more format diversity in radio broadcasting.[686]

315. In light of this record, we cannot conclude that radio ownership concentration has any effect on format diversity, either harmful or beneficial. Accordingly, we do not rely on it to justify the local radio ownership rule.[687]

2. Attribution of Joint Sales Agreements

316. In the *Local Radio Ownership NPRM*, we sought comment on the appropriate regulatory treatment for radio Joint Sales Agreements (JSAs).[688] A typical radio JSA authorizes the broker to sell advertising time for the brokered station in return for a fee paid to the licensee. Because the broker normally assumes much of the market risk with respect to the station it brokers, JSAs generally give the broker authority to

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[686] Even if the Steiner model is an accurate model of program choice in broadcasting, we would not necessarily conclude that greater consolidation in radio broadcasting would serve the public interest. As explained above, consolidation may have certain negative effects on innovation and program quality that outweigh any asserted increase in program diversity. Because we do not rely on the Steiner model here, we do not attempt to undertake a balancing of those competing interests at this time.

[687] We leave open the possibility that, after further research, additional evidence may be adduced to establish the link between ownership concentration and format diversity. If such a link can be shown, we will consider the implications of that link on the local radio ownership rule at that time.

[688] As we stated in the *Notice*, as a general matter, we are not reviewing our attribution rules as part of the biennial review process. *Notice*, 17 FCC Rcd at 18506 ¶ 7 n.13. However, we specifically sought comment in the *Local Radio Ownership NPRM* on whether to attribute radio JSAs. Therefore, we will consider changes to our attribution rules only in this one context. Because we did not raise the issue of whether to change our current policy regarding non-attribution of television JSAs, we will not consider any changes in this *Order*. We will issue a future Notice of Proposed Rulemaking to seek comment on whether or not to attribute television JSAs.

hire a sales force for the brokered station, set advertising prices, and make other decisions regarding the sale of advertising time, subject to the licensee's preemptive right to reject the advertising. Currently, JSAs are not attributable under the Commission's attribution rules. Therefore, radio stations subject to JSAs do not count toward the number of stations the brokering licensee may own in a local market.

317. Based on the record in this proceeding, and on our experience with JSAs and our local radio ownership rules, we will now count the brokered station toward the brokering licensee's permissible ownership totals under the revised local ownership rules. Where an entity owns or has an attributable interest in one or more stations in a local radio market, joint advertising sales of another station in that market for more than 15 percent of the brokered station's advertising time per week will result in counting the brokered station toward the brokering licensee's ownership caps. Specifically, we have concerns regarding the impact of in-market JSAs on competition in local radio markets. We do not believe that out-of-market JSAs pose the same economic concerns. Therefore, JSAs will not be attributable when a party does not own any stations or have an attributable interest in stations in the local market in which the brokered station is located.[689]

318. In considering revisions to our attribution rules, we have always sought to identify and include those positional and ownership interests that convey a degree of influence or control to their holder sufficient to warrant limitation under our

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[689] For instance, consider a licensee that owns a radio station in the Cleveland, Ohio, radio metro, and has a JSA for a radio station in the Akron, Ohio, radio metro. The broker owns no stations in the Akron, Ohio, market. The JSA in the Akron, Ohio, market therefore would not be attributable. However, in-market JSAs will be attributable regardless of whether the advertising time for the station is sold in conjunction with commonly owned stations in the same market, or with stations in distant markets. The potential for influence over the brokered station would exist under both scenarios.

ownership rules.[690] As with LMAs, JSAs are not precluded by any Commission rule or policy as long as the Commission's ownership rules are not violated and the participating licensees maintain ultimate control over their facilities. Nothing in the record indicates that licensees abdicate control over stations that are subject to JSAs. However, we find that the use of in-market JSAs may undermine our continuing interest in broadcast competition sufficiently to warrant limitation under the multiple ownership rules.[691] Where we have referred to *influence*, we have viewed it as an interest that is less than controlling, but through which the holder is likely to induce a licensee to take actions to protect the interests of the holder. Our judgment as to what level of influence should be subject to restriction by the multiple ownership rules has, in turn, been based on our judgment regarding what interests in a licensee convey a realistic potential to affect its programming and other core operational decisions.[692]

319. We find that where one station owner controls a large percentage of the advertising time in a particular market, it has the ability potentially to exercise market power. Many times, the broker will sell advertising packages for the group of stations, offer substantial discounts and create incentives not available to other broadcasters in the market. In any given radio market, a broker may own or have an ownership interest in stations, operate stations pursuant to an LMA,[693] or sell

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[690] *Attribution of Ownership Interests*, 97 F.C.C.2d 997, 999, 1005 (1984), ("*1984 Attribution Order*") *on recon.*, 58 RR 2d 604 (1985), *on further recon.*, 1 FCC Rcd 802 (1986); *1999 Attribution Report and Order*, 14 FCC Rcd at 12612 ¶ 121.

[691] *See 1992 Radio Ownership Order*, 7 FCC Rcd at 2788 ¶ 64; *Attribution NPRM*, 10 FCC Rcd 3606, 3609 ¶ 4 (1995) (*quoting 1984 Attribution Order*, 97 F.C.C.2d at 999).

[692] *Attribution NPRM*, 10 FCC Rcd at 3610 ¶ 4.

[693] LMAs typically provide that the broker may sell advertising time and retain the advertising revenue for the programming it provides to the brokered station.

advertising time for stations pursuant to a JSA. "Control over spot sales by one station affords significant power over the other."[694] Thus, JSAs raise concerns regarding the ability of smaller broadcasters to compete, and may negatively affect the health of the local radio industry generally. JSAs put pricing and output decisions in the hands of a single firm. Instead of stations competing against one another, a single firm sells packages of time for all stations, eliminating competition in the market.

320. We have not previously attributed JSAs based on our earlier conclusion that JSAs do not convey sufficient influence or control over a station's core operations to be considered attributable.[695] While we have recognized the DOJ's concerns as to the impact of same-market radio JSAs on competition, we noted that the DOJ and the Commission's concerns may differ in certain respects.[696] We have previously distinguished JSAs and LMAs, finding that only LMAs have the ability to affect programming, personnel, advertising, physical facilities, and other core operations of stations.[697] There are several reasons for our policy change. Upon reexamination of the attribution issue, we find that, because the broker controls the advertising revenue of the brokered station, JSAs have the same potential as LMAs to convey sufficient influence over core operations of a station to raise significant competition concerns warranting attribution.[698] As with LMAs, licensees of stations subject to

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[694] *1999 Attribution Report and Order*, 14 FCC Rcd at 12612 ¶ 121.

[695] *Id.* at 12612 ¶ 122. However, we left open the possibility that JSAs could threaten competition, and retained discretion to review cases involving radio or television JSAs on a case-by-case basis if it appeared that such JSAs pose competition or other concerns. *Id.* at 12613 ¶ 123. *See, e.g., Shareholders of the Ackerly Group, Inc. (Transferor) and Clear Channel Corp. (Transferee)*, 17 FCC Rcd 10828 (2002).

[696] *1999 Attribution Order*, 14 FCC Rcd at 12612 ¶ 122.

[697] *Id.*

[698] In 1996, we revisited the issue of whether to attribute JSAs. *See Review*

JSAs typically receive a monthly fee regardless of the advertising sales or audience share of the station. Therefore, licensees of stations subject to JSAs have less incentive to maintain or attain significant competitive standing in the market.

321. Although we continue to believe that JSAs may have some positive effects on the local radio industry, we find that the threat to competition and the potential impact on the influence over the brokered station outweighs any potential benefits and requires attribution. As with our decision in 1992 to attribute radio LMAs, we find that modification of our regulation also is warranted given the need for our attribution rules to reflect accurately competitive conditions of today's local radio markets.[699] We noted then, and it still holds true today, that it would be inconsistent with our rules to allow a local station owner to substantially broker a station, whether pursuant to an LMA or JSA, that it could not own under the local radio ownership limits.[700]

322. Some commenters argue that we should continue to exempt JSAs from attribution because they produce a public

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of the Commission's Regulations Governing Attribution of Broadcast Interests, 11 FCC Rcd 19895, 19911 (1996) ("*1996 Attribution FNPRM*"). We considered whether JSAs present diversity and competition concerns, and whether a company could potentially exert market power by controlling a certain amount of the advertising revenue share in the market. In declining to attribute JSAs, we concluded that they do not convey the degree of influence or control over station programming or core operations such that they should be attributed. *1999 Attribution Order*, 14 FCC Rcd at 12612 ¶ 122.

[699] In 1992, based on concerns about competition and diversity, we attributed radio LMAs where an entity owns a station in a local radio market and brokers another station in the market for more than 15 percent of the brokered station's broadcast hours per week. *1992 Radio Ownership Report and Order*, 7 FCC Rcd at 2788. In 1999, we attributed television LMAs. *See 1999 Attribution Report and Order*, 14 FCC Rcd at 12597 ¶ 83.

[700] *1992 Radio Ownership Report and Order*, 7 FCC Rcd at 2788- 89 ¶ 65.

interest benefit.[701] Others believe that we either should treat JSAs the same as LMAs in our competition analysis,[702] or that we should require prior approval for both JSAs and LMAs.[703] Clear Channel argues that "[n]othing has transpired over the succeeding two years [since we decided not to attribute JSAs] that would justify reconsideration of these positions."[704] We disagree with Clear Channel. Our experience administering the local radio ownership rule convinces us that we need to modify our attribution policy with regard to JSAs for the above reasons. Although, like LMAs, JSAs might produce public interest benefits, we find that JSAs may convey sufficient influence or control over advertising to be considered attributable.[705]

323. We believe that a 15 percent advertising time threshold will identify the level of control or influence that would realistically allow holders of such influence to affect core operating functions of a station, and give them an incentive to do so. At the same time, a 15 percent threshold will allow a station the flexibility to broker a small amount of advertising time through a JSA with another station in the same market

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[701] Clear Channel Comments in MM Docket No. 01-317 at 27; Cox Comments in MM Docket No. 01-317 at 17-18; Cumulus Comments in MM Docket No. 01-317 at 15 n.10; Clear Channel Reply Comments in MM Docket No. 01-317 at 5 n.7.

[702] Dick Broadcasting Comments in MM Docket No. 01-317 at 8; Eure Comments in MM Docket No. 01-317 at 2; Idaho Wireless Comments in MM Docket No. 01-317 at 9; Hodson Comments in MM Docket No. 01-317 at 9.

[703] North American Comments in MM Docket No. 01-317 at 17-18; Dick Broadcasting Comments in MM Docket No. 01-317 at 8; Idaho Wireless Comments in MM Docket No. 01-317 at 9.

[704] Clear Channel Comments in MM Docket No. 01-317 at 27.

[705] As evidence of potential adverse competitive effects pursuant to the interim policy adopted in the *Local Radio Ownership NPRM*, we considered the presence of both LMAs and JSAs in the relevant radio market. *Local Radio Ownership NPRM*, 16 FCC Rcd at 19896 ¶ 86.

without that brokerage rising to an attributable level of influence. We believe that the 15 percent threshold (which is the same threshold used for determining attribution of radio and television LMAs) balances these interests.[706]

324. Under our modified rules, JSAs currently in existence will be attributable. Parties with existing, attributable JSAs in Arbitron Metros under our new rules will be required to file a copy of the JSA with the Commission within 60 days of the effective date of this *Order*.[707] For JSAs involving stations located outside of Arbitron Metros, we will require such JSAs to be filed within 60 days of the effective date of our decision in Docket No. 03-130, unless a different date is announced in that decision. In addition, we are modifying FCC Application Forms 314 and 315 to require applicants to file attributable JSAs at the time an application is filed, regardless of whether the markets implicated by the application are located in Arbitron Metros.

325. *Existing JSAs*. We are aware that attribution of in-market radio JSAs may affect licensees' compliance with the modified local radio ownership rules. In addition, we do not want to unnecessarily adversely affect current business arrangements between licensees and brokers. Therefore, we will give licensees sufficient time to make alternative business arrangements where they have in-market JSAs entered into prior to the adoption date of this *Order* that would cause them to exceed relevant ownership limits. In such situations, parties will have 2 years from the effective date of this *Order* to terminate agreements, or otherwise come into compliance with the local radio ownership rules adopted herein.[708] However, if

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[706] *See 1999 Attribution Report and Order*, 14 FCC Rcd at 12598 ¶ 85 n.183.

[707] Both the licensee and the broker should submit copies of their JSAs as supplements to their Ownership Reports on file at the Commission.

[708] This includes JSAs involving radio stations in non-Metro markets. We believe the two-year time grace period will give sufficient time for us to

a party sells an existing combination of stations within the 2-year grace period, it may not sell or assign the JSA to the new owner if the JSA causes the new owner to exceed any of our ownership limits; the JSA must be terminated at the time of the sale of the stations. JSAs that do not cause a party to exceed the modified local radio rules may continue in full force and effect and may be transferred or assigned to third parties. Finally, parties are prohibited from entering a new JSA or renewing an existing JSA that would cause the broker of the station to exceed our media ownership limits.

3. Waiver Standards

326. In the *Local Radio Ownership NPRM*, we requested comment on how we should analyze proposed radio station transactions involving failed, failing, unbuilt, or silent stations.[709] We presented this question in terms of our consideration of a case-by-case competition analysis of radio station transactions (as opposed to requesting specific comment on potential waiver standards), and we in fact received very few comments addressing this issue.[710] In light of our rejection of a case-by-case analysis for radio transactions, the other changes we are making to the local radio ownership rule, and the dearth of comments on this issue, we decline at this time to adopt any specific waiver criteria relating to radio station ownership. Parties who believe that the particular facts of their case warrant a waiver of the local radio ownership rule may seek a waiver under the general "good cause" waiver standard in our rules.[711]

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conclude the proceeding in MB Docket No. 03-130 and give parties sufficient time thereafter to take any necessary action to come into compliance with our media ownership rules.

[709] *Local Radio Ownership NPRM*, 16 FCC Rcd at 19891-92 ¶¶ 74-77.

[710] *See* MMTC Comments in MM Docket No. 01-317 at 53.

[711] 47 C.F.R. § 1.3.

C. Cross Ownership

327. In this section we address (1) the newspaper/broadcast cross-ownership rule[712] and (2) the radio-television cross-ownership rule[713] to determine whether they are necessary in the public interest pursuant to Section 202(h). Based on the record in this proceeding, we find that neither our current nation-wide prohibition on common ownership of daily newspapers and broadcast outlets in the same market nor our cross-service restriction on commonly owned radio and television outlets in the same market, is necessary in the public interest. With respect to both rules, we conclude that the ends sought can be achieved with more precision and with greater deference to First Amendment interests by modifying the rules into a single set of cross-media limits described below.

1. Newspaper/Broadcast Cross-Ownership Rule

328. Adopted in 1975, the newspaper/broadcast cross-ownership rule prohibits in absolute terms common ownership of a full-service broadcast station and a daily newspaper when the broadcast station's service contour encompasses the newspaper's city of publication.[714] The rule was intended to promote media competition and diversity,[715] yet the rule makes no allowance for the size of the market at issue, the number of broadcast outlets or newspapers in the market, or the variety of other media interests that serve the market. When it adopted

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[712] 47 C.F.R. § 73.3555(d).

[713] 47 C.F.R. § 73.3555(c).

[714] For AM radio stations, the service contour is the 2mV/m contour, 47 C.F.R. § 73.3555(d)(1); for FM radio stations, the service contour is the 1mV/m contour, *id.* § 73.3555(d)(2); for TV stations, the service contour is the Grade A contour, *id.* § 73.3555(d)(3). A daily newspaper is one that is published in the English language four or more times per week. *Id.* § 73.3555 n.6.

[715] *1975 Multiple Ownership Second Report and Order*, 50 F.C.C.2d at 1074.

the rule, the Commission grandfathered combinations in many markets (so long as the ownership of the combination remained the same), but it required divestiture of properties in highly concentrated markets. These so-called highly concentrated markets were those in which a combination of newspaper and broadcast outlets would be expected to be the most harmful to media diversity.

329. The Commission examined the newspaper/broadcast cross-ownership rule and several other broadcast ownership rules in its first biennial review in 1998.[716] The Commission concluded in its 1998 Biennial Review Report that the newspaper/broadcast cross-ownership rule continued to serve the public interest because it furthered diversity, and therefore should be retained.[717] However, the Commission noted that the rule might not be necessary to achieve its intended public interest benefits under all circumstances. More specifically, the Commission stated that "[t]here may be instances, for example, in which, given the size of the market and the size and type of the newspaper and broadcast outlet involved, sufficient diversity and competition would remain if a newspaper/broadcast combination were allowed."[718] Thus, the Commission committed to undertaking a rulemaking proceeding to tailor the rule accordingly.[719] That proceeding

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[716] *1998 Biennial Regulatory Review*, *Notice of Inquiry*, 13 FCC Rcd 11276 (1998) (*"Biennial NOI"*). The Commission incorporated the record from the *Newspaper/Radio NOI* into the record of the *Biennial NOI*. *See id.* at 11286 ¶ 30.

[717] *1998 Biennial Review Report*, 15 FCC Rcd at 11105-08 ¶¶ 89-93.

[718] *Id.* at 11105 ¶ 88. The Newspaper Association of America ("NAA") challenged the Commission's decision not to repeal the rule. *Newspaper Ass'n of America v. FCC*, Case No. 00-1375 (D.C. Cir. filed Aug. 16, 2000). By order dated August 30, 2000, the court held the case in abeyance.

[719] *Id.* In its 2000 biennial regulatory review proceeding, the Commission did not alter the recommendations it had made with respect to the newspaper/broadcast cross-ownership rules in the 1998 biennial review proceeding. *See 2000 Biennial Regulatory Review*, 16 FCC Rcd 1207

was commenced in 2001,[720] and later was made part of this biennial review proceeding.[721]

330. Upon review, we now conclude that (1) the rule cannot be sustained on competitive grounds, (2) the rule is not necessary to promote localism (and may in fact harm localism), and (3) most media markets are diverse, obviating a blanket prophylactic ban on newspaper-broadcast combinations in all markets.[722] Instead, we will review proposed license transfers and renewals involving the combination of daily newspapers and broadcast properties only to the extent that they would implicate the cross-media limits discussed below.

a. Competition

331. We first define the relevant product and geographic markets in which broadcasters and newspapers compete, and then assess whether the rule is necessary to promote competition in these markets. As we noted in the newspaper/broadcast proceeding, our focus is on the primary economic market in which broadcast stations and newspapers compete: advertising.[723] Our concern is not related to competition in advertising markets themselves, but is instead

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(2001).

[720] *Newspaper/Broadcast Cross-Ownership NPRM*, *supra*.

[721] *Notice*, 17 FCC Rcd at 18506 ¶ 7.

[722] A number of parties raise Constitutional objections to the rule. *See, e.g.*, NAA Comments at 102-14. To the extent that our local broadcast ownership regulatory framework may prohibit some newspaper/broadcast combinations, we addressed this argument in the Legal Framework section, above. We address the comments of those parties who have argued that we should change the way we apply the rule in primarily Spanish language markets (*e.g.*, Arso Comments and Caribbean Comments in MM Docket No. 01-235) in the section on Cross-Media Limits, *infra*.

[723] *Newspaper/Broadcast Cross-Ownership NPRM*, 16 FCC Rcd at 17292 ¶ 19.

directed at the ability of broadcasters to compete for advertising dollars. If free over-the-air broadcasting is to remain vibrant, broadcasters must be able to organize efficiently and compete for advertising dollars. We look, therefore, to the sole source of revenue for these stations – advertising – to define the product market.[724]

332. We conclude, based on the record in this proceeding, that most advertisers do not view newspapers, television stations, and radio stations as close substitutes. To begin with, the Department of Justice and several federal courts have concluded that the local newspaper market is distinct from the local broadcast market.[725] This conclusion is supported by a number of commenters and MOWG Study No. 10, by Anthony Bush, which found "weak substitutability" between various local media outlets for purposes of local advertising sales.[726] Cox argues, for instance, that advertisers place ads in television, radio, and newspapers for different reasons.[727] CWA asserts that newspapers and television are separate local media markets, with weak substitution by consumers and advertisers.[728] Gannett and Hearst argue that very little

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[724] A product market includes identical products, products with such negligible differences that buyers regard them as substitutes, and other products that buyers regard as such close substitutes that a slight price increase in one will induce shifts of demand to the other. *See DOJ/FTC Merger Guidelines*.

[725] *See, e.g., United States v. Jacor Communications Inc.*, 1996 WL 784589 at *10 (S.D. Ohio 1996); *Community Pub. Inc. v. Donrey Corp.*, 892 F. Supp. 1146, 1155-57 (W.D. Ark. 1995).

[726] MOWG Study No. 10. Bush develops a model of business behavior in purchasing advertising for use in sales activities. He estimates elasticities of substitution and finds weak substitutability for advertising between newspaper, broadcast TV, and radio.

[727] Cox argues, for example, that while television is used to build and maintain a brand, newspapers are used to move volumes of products. *See* Cox Comments at 17-18.

[728] *See* CWA Comments at 9-1; AFL-CIO Comments, Baker Study, at 5-7.

advertising substitution exists between daily newspapers and broadcast outlets. They claim that newspapers, radio, and TV attract different portions of local advertising dollars, which refutes the notion that common ownership has any adverse impact on advertising rates or any other competition concerns.[729] Thus, at least for purchasers of advertising time, we find that newspapers, television, and radio are not good substitutes and therefore make up distinct product markets. A newspaper/broadcast combination therefore is not a horizontal merger and cannot adversely affect competition in any product market. Neither is the combination a vertical merger, because neither type of entity sells inputs to the other in the production chain, as in a supplier-customer relationship.[730]

333. Some commenters criticize MOWG Study No. 10 and argue that radio, TV, and newspapers, compete vigorously for advertising dollars.[731] Both Economists Incorporated ("EI")

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[729] *See* Gannett Comments at 15-17; Hearst Comments at 8-10; Hearst Comments in MM Docket No. 01-235 at 14.

[730] *See* Hearst-Argyle Reply Comments at 4 n.8 (citing *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851 (2d Cir. 1974); *Emhart Corp. v. USM Corp.*, 527 F.2d 177 (1st Cir. 1975)). Although the merging of newspapers and television stations may result in sharing of inputs, sharing of inputs is distinct from vertical integration, which involves merging of firms where the output of one becomes the input of the other.

[731] Many of the commenters who assert that there is vigorous competition and strong substitution among media advocate elimination of the cross-ownership rules. They argue that consolidation of owners between any two media will not result in a significant increase in advertising prices because advertisers substitute across virtually all media. Hearst-Argyle, for example, asserts that its own analysis of prior studies show that local advertisers view newspaper and broadcast advertising as substitutes for one another, and national advertisers may view newspaper and broadcast advertising similarly. It concludes that all these results, combined with the increase in the number of media outlets, support repeal of the rule. Hearst-Argyle at 1-8 (referencing Barry J. Seldon, R. Todd Jewell, & Daniel M. O'Brien, *Media Substitution and Economies of Scale in Advertising*, 18 INT'L J OF INDUS ORG 1153 (2000); Barry J. Seldon & Chulho Jung, *Derived Demand for*

and Jerry Hausman argue that MOWG Study No. 10 contains measurement errors.[732] These commenters argue that there are two sources of measurement error: (1) the SQAD radio and television advertising rate data measures national and regional, but not local advertisers;[733] and (2) the study, rather than measuring actual local newspaper ad prices, constructs them. Both critiques suggest that these measurement errors lead to bias. EI does not explain whether it believes the bias is in the direction toward too little or too much substitution among media, but Hausman argues that MOWG Study No. 10 is biased in the direction of too little substitution.[734] We recognize the measurement errors associated with the use of SQAD data. Bush used this data because there is no source of data available to the public on actual local advertising prices. As the best public data available, we believe the SQAD data is a reasonable proxy for actual local advertising prices.[735] As for Hausman's claim that use of SQAD prices biases the results in the direction of too little substitution, we believe that Hausman's arguments apply to a simple linear regression, not the model or estimation technique used by Bush. We believe that the effects of these measurement errors may cancel out such that the estimates of Bush are unbiased. Accurate data are required in order to examine this possibility. Bush used, however, available and

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Advertising Messages and Substitutability Among the Media, 33 Q. REV OF ECON AND FIN 71 (1993)).

[732] *See* Fox Comments, Appendix C, Economist Incorporated; Clear Channel Comments, Hausman Statement at 11-18. *See* Appendix E for a more complete summary of the criticisms by Professor Hausman and Dr. Owen and our response.

[733] SQAD, Inc. is an independent media research company that produces measures of the costs of purchasing advertising spots on radio and TV.

[734] Clear Channel Comments, Hausman Statement at 17. (Professor Hausman's statement is part of Clear Channel's filing, which advocates relaxation or elimination of radio ownership rules in local markets.)

[735] Measurement errors due to use of SQAD data are discussed more fully in Appendix E.

public data in his study. Therefore, we recognize the limitations of the data in the Bush study and assign the study an appropriate weight while considering other evidence on the record.

334. Hausman offers as evidence regressions that show significant correlation between the prices of advertising on various media.[736] Hausman's analysis consists of regressing the price of advertising on radio on a set of variables that include the price of advertising on two other media (broadcast TV and newspapers) and various measures of ownership concentration in a market. He reports no significant positive relationship between radio ad pricing and concentration, but does find significant correlation between the prices of radio advertising on the price of advertising on other media. We are reluctant, however, to conclude that this correlation implies strong substitution in the advertising market. First, Hausman's regressions omit important variables that may result in bias.[737] Second, the data used for Professor Hausman's study were not made available in the record of this proceeding. As a result, neither the Commission nor other interested parties have had an opportunity to perform independent analysis of the data to either confirm or refute Professor Hausman's conclusions. Third, Hausman studies the substitution between radio and other forms of media using a simple linear regression model, rather than a simultaneous equation model.[738]

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[736] *See* Clear Channel October 15, 2002, Ex Parte, Hausman Statement, Table 3 at 17.

[737] *See* Clear Channel Comments, Hausman Statement at Table 3. Usually, when econometricians estimate equations with the price of a good as a dependant variable, such as a demand or supply equation, the quantity or income generated by that good is included as an independent variable. Hausman includes neither the quantity nor income in his regressions. Omission of such a key variable often leads to bias in the coefficients of the included independent variables. *See* Peter A. Kennedy, A GUIDE TO ECONOMETRICS, (3rd ed. 1992) at 91.

[738] Systems of equations, such as a group of demand equations, allow more

335. Further, other empirical studies confirm our conclusion that advertisers do not view ads in newspapers and broadcast TV as substitutes. Silk, Klein, and Berndt examine advertising substitution among eight media in the national markets. [739] They report only weak substitution between newspapers and spot TV; they also report that advertising on network TV and newspapers are complements, not substitutes. Busterna estimates demand functions in five media (including network and spot television) and concludes that "cross-elasticity of demand between newspapers and other media is consistently nil across all media."[740] Reid and King conduct a study based on interviewing and surveying advertising managers in national markets and conclude that these managers did not view television and newspapers to be good substitutes for advertising.[741] Finally, the Department of Justice and several federal courts have concluded that the local newspaper market is distinct from the local broadcast market.[742]

336. Although the studies discussed in the paragraph above focus on national advertising markets, not local ones, the results likely extend to local markets. We see no evidence that local advertisers would more easily substitute between TV and newspapers than national advertisers. Indeed, evidence suggests that local advertisers are less likely to substitute among media than national advertisers. For example, classified

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efficient estimation than regressing one equation, especially when economic theory is employed to constrain estimates across equations. By efficient, we mean here that the uncertainty of the parameter estimates, given the underlying data, is reduced. *See*, e.g., Silk, Klein, and Berndt, *supra* note 522, and MOWG Study No. 10. For more discussion on estimating systems of equations, *see* William Greene, ECONOMETRIC ANALYSIS (1990) at 509-542.

[739] Silk, Klein, and Berndt, *supra*.

[740] John C. Busterna, *The Cross-Elasticity of Demand for National Newspaper Advertising*, 64 J Q 349 (Summer/ Autumn 1987).

[741] Reid and King, *supra* note 523 at 292-307.

[742] *Supra* note 728.

ads, an important component of local advertising, comprising 40% of newspaper advertising revenues, offer affordable local advertising that is not available on broadcast TV.[743] In addition, newspapers provide unique features (*e.g.*, coupons to be redeemed with local retailers) that are not available through broadcast TV or radio.[744] We believe, therefore, that findings of weak substitution between newspapers and broadcast TV for national advertisers likely apply to local buyers as well.

337. Indeed, Cox states that aggregate advertising prices in markets with grandfathered media combinations are consistent with prices in other markets after adjusting for market size.[745] Gannett states that the combined local measurable advertising market revenue share of a newspaper and television station it now owns in Phoenix, Arizona, was nearly the same prior to 1999, when the properties came under common ownership, as it is now.[746] Further, the synergies and cost reductions of joint-ownership may translate into increased, rather than decreased competition within each service. Media General provides a number of case studies that suggest increased services and reduced costs through newspaper and broadcast TV partnerships.[747] By precluding the efficiencies inherent in combinations, the rule likely harms consumers by limiting the

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[743] Newspaper Association of America website (*http://www.naa.org*). The NAA estimates that 48% of local newspaper advertising dollars are allocated to classified ads, which have no good substitutes on television or radio media. NAA Comments at 55-65.

[744] Cox asserts that advertisers place ads in television, radio and newspapers for different reasons. *See* Cox Comments at 16-21.

[745] *Id.* at 16-21 (citing the Media Market Guide published by SQAD, Inc.).

[746] Gannett Comments at 14-16 and Exhibit B. Schurz Communications, Inc. similarly argues that two grandfathered combinations in South Bend, Indiana, have not caused the percentage of local advertising dollars spent with newspapers, television and/or radio stations to differ from that spent by national advertisers. Schurz Comments at 8-10.

[747] Media General Comments, Appendix 3, Statement of James K. Gentry.

development of new, innovative media services that would flow from a more efficient, combined entity.[748]

338. A number of commenters believe the rule is necessary to protect advertisers that substitute between newspapers and broadcast TV. UCC argues that cross-media consolidation will likely harm advertisers in local markets. It concludes that consumers will have to pay more for products in a market with commonly owned newspapers and broadcast stations because advertisers will have to pay more to advertise and these increased costs will be passed on to consumers.[749] Others, such as Caribbean International News Corp., assert that in markets where there are newspaper/broadcast combinations, the commonly owned firms aggressively market multimedia advertising packages, creating a competitive imbalance.[750] CFA contends that a review of the literature on vertical and conglomerate mergers identifies major concerns about such mergers in concentrated markets where dominant players can employ a range of anticompetitive tactics (e.g., raising entry barriers, cross-subsidization, price squeezing, price discrimination, market foreclosure and exclusive deals) to thwart competition.[751]

339. Although the overall evidence appears to suggest little substitution between newspapers, broadcast TV, and radio, we agree that there may be a small group of advertisers that benefit

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[748] NAB Comments at 63-65, 101. *See also* Belo Comments at 1-8 (claiming its Dallas-Fort Worth combination has increased synergies and economies of scale that benefit the public); Cox Comments at 70 (claiming co- ownership benefits the operation of local media markets).

[749] *See* UCC Comments at 11-13.

[750] Caribbean Comments at 27-35. Caribbean reports that such cross-ownership has created a situation where one owner (with two daily newspapers) garners 43% of the advertising revenues for traditional media outlets in Puerto Rico.

[751] CFA Comments at 96-121; *see also* Mid-West Comments at 5-6; UCC Comments at 13.

from using various media to advertise their products. These advertisers could be harmed if owners of newspaper/broadcast combinations can identify this group and price discriminate -- charge higher prices to this group than they charge to other advertisers for the same product.[752] As explained above, however, the Commission is not charged with protecting competition in the advertising markets. These advertisers, however, are not without remedy. The Department of Justice, the Federal Trade Commission, as well as state attorney generals, review mergers generally and are concerned about the effects in the advertising market. Further, both federal and state antitrust laws allow private suits to be brought. The Commission's interest in advertising markets extends only so far as issues relating to advertisers might affect the ability of FCC licensees to serve the public interest, convenience, and necessity. Since we see no potential harm to broadcasters, television viewers or radio listeners, the concern raised regarding harm to an ill-defined subset of advertisers does not justify retaining the rule.[753]

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[752] *DOJ/FTC Merger Guidelines* § 1.12 explains: "Existing buyers sometimes will differ significantly in their likelihood of switching to other products in response to a small but significant and non-transitory price increase. If a hypothetical monopolist can identify and price differently to those buyers ("targeted buyers") who would not defeat the targeted price increase by substituting to other products in response to a 'small but significant and nontransitory' price increase for the relevant product, ... then a hypothetical monopolist would profitably impose a discriminatory price increase on sales to targeted buyers. This is true regardless of whether a general increase in price would cause such significant substitution that the price increase would not be profitable."

[753] There is nothing in the record regarding the number of advertisers that may be targeted for such price discrimination, nor the magnitude of the potential price increases. We believe, however, that the number of advertisers that may be potential targets of price discrimination would be very small for most newspaper/broadcast combinations.

340. In any event, even if we were to focus exclusively on the advertising markets alone, the potential for harm to advertisers who substitute between various media outlets would be greatest if one entity owned all the newspapers and all the broadcast facilities. Through the constraining effect of our local radio and TV ownership rules, we expect that the majority of the potential newspaper/broadcast combinations would continue to face competition from separately owned media outlets in the local market.

341. Finally, consumers experience print and electronic media in very different ways.[754] Electronic media can provide real-time information concerning current events, sporting contests, or other time sensitive matters. Electronic media also can be experienced more passively, as users may engage in other activities simultaneously while enjoying television or radio programming. Print media, on the other hand, require a higher degree of engagement by the consumer, but they also are capable of delivering greater depth of coverage. These differences are significant from a competitive standpoint both for consumers and, as described above, for advertisers. For consumers this means that the programming or content is different between newspapers and broadcast TV. Advertisers will view newspapers and TV broadcast as imperfect substitutes. A newspaper-broadcast combination, therefore, cannot adversely affect competition in any relevant product market. Accordingly, we cannot conclude that the current newspaper-broadcast cross-ownership rule is necessary to promote competition.

b. Localism

342. The record indicates that the newspaper/broadcast cross-ownership prohibition is not necessary to promote

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[754] For a summary table that compares the characteristics of print with electronic media, see David W. Stewart and Scott Ward, *Media Effects on Advertising*, MEDIA EFFECTS: ADVANCES IN THEORY AND RESEARCH (1994) at 328.

broadcasters' provision of local news and information programming. Indeed, evidence suggests that the rule actually works to inhibit such programming. One of the strengths of daily newspapers is their ability to provide in-depth coverage of local news and events.[755] Many newspapers provide local content that far exceeds that provided by local broadcast outlets. Newspapers and broadcast stations – particularly television stations -- continue to be the dominant sources, in terms of consumer use, for news and information to local communities.[756] Our rules should promote the ability of newspapers, television stations, and all other sources of local news and information to serve their communities.

343. Although the Commission does not regulate quality of programming, and, indeed, such regulation of content would raise significant First Amendment concerns, we have historically sought to promote the ability of local stations to serve their communities through news and public affairs programming. Our MOWG studies suggest a direct correlation between the association of a broadcast outlet with a published daily newspaper and the quality of the local broadcast news. In MOWG Study No. 7, "The Measurement of Local Television News and Public Affairs Programs," the authors found that television broadcast stations affiliated with a major broadcast television network that are "co-owned with newspapers experience noticeably greater success [in terms of] quality and quantity of local news programming than other network affiliates."[757] Co-ownership, the authors explain, refers to a

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[755] *E.g.*, Tribune Comments in MM Docket No. 01-235 at 43-52 (core mission of daily newspapers is to provide local news).

[756] MOWG Studies No. 8; MOWG Study No. 3, *Consumer Substitution Among Media* by Joel Waldfogel (Sept. 2002)("MOWG Study No. 3"); *see also* AFL-CIO Comments at 34-36; AFTRA Comments at 26-28; Comments of CWA at 5-9.

[757] MOWG Study No. 7, *The Measurement of Local Television News and Public Affairs Programs*, by Thomas C. Spavins, Loretta Denison, Jane Frenette and Scott Roberts (Sept. 2002) at 1 ("MOWG Study No. 7").

company that owns at least one television station and one daily newspaper; the two need not necessarily serve the same market.[758] Accordingly, while eliminating the rule may not be essential to achieve the efficiencies of common ownership -- because the rule prohibits only ownership of newspapers and broadcast stations serving the same market -- the breadth and depth of news coverage can be enhanced by collocation and the rule's elimination will increase the opportunities to realize these benefits by permitting combinations in areas where the rule currently prohibits them.

344. Specifically, MOWG Study No. 7 found that while non-network owned but network-affiliated stations provide, on average, 14.9 hours per week of local news and public affairs programming, newspaper-owned affiliated stations provide almost 50% more such programming, averaging 21.9 hours per week.[759] In addition, the study found that the average number of hours of local news and public affairs programming provided by the same-market cross-owned television-newspaper combinations was 25.6 hours per week, compared to 16.3 hours per week for the sample of television stations owned by a newspaper that is not in the same market as the station.[760] Not only do newspaper-owned stations provide more news and public affairs programming, they also appear to provide higher-quality programming, on average, at least as measured by ratings and industry awards. The ratings for newspaper-owned stations' 5:30 and 6:00 pm newscasts during the November 2000 sweeps period averaged 8 compared to an average rating of 6.2 for non-newspaper-affiliated stations.[761] More

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[758] *Id.* at 3, note 1.

[759] *Id.* at 3.

[760] This information was derived from an examination of the data included in the appendices of MOWG Study No. 7, as well as information in the record of this proceeding regarding the same market television/newspaper combinations. *See* NAA Comments at 14-15.

[761] *Id.*

dramatically, newspaper-owned stations received 319 percent of the national average per station Radio and Television News Directors Association ("RTNDA") awards, and 200 percent of the national average A. I. DuPont Awards (in association with the School of Journalism of Columbia University) in 2000-2001.[762] During that same period, non-newspaper-owned stations received RTNDA Awards at a rate of only 22 percent of the national average.[763] They received DuPont Awards at a rate of 39 percent of the national average per station.[764] The authors conclude that, "within the overall category of network affiliates, there appears to be a systematic divergence between stations that are co-owned with a newspaper publisher relative to all other affiliates. For each quality and quantity measure in our analysis, the newspaper network-affiliated stations exceed the performance of other, non-newspaper-owned network affiliates."[765]

345. These conclusions are supported by a study done by the Project for Excellence in Journalism ("PEJ") in which PEJ analyzed five years of data on ownership and news quality. PEJ concluded that cross-owned stations in the same Nielsen Designated Market Area were more than twice as likely to receive an "A" grade as were other stations.[766] On the whole,

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[762] *Id.* at 4.

[763] *Id.*

[764] *Id.* While there is controversy in the record about some aspects of this study, no commenter has critiqued the newspaper-related evidence.

[765] *Id.*

[766] Project for Excellence in Journalism, *Does Ownership Matter in Local Television News: A Five-Year Study of Ownership and Quality* (Feb. 17, 2003) at 10 ("PEJ Study"). Elsewhere in this *Report and Order*, we determine that the results of the PEJ study are statistically insignificant and cannot be considered reliable or convincing evidence. *See* National TV Ownership Rule Section VII(A), *infra*. We use PEJ's filing here solely as a source of anecdotal evidence, not as a statistical study, and do not base our conclusions regarding the newspaper/broadcast cross-ownership rule upon it.

cross-owned stations were more likely to do stories focusing on important community issues and to provide a wide mix of opinions, and they were less likely to do celebrity and human-interest features.[767]

346. The benefits of combined ownership are not likely to be achieved through joint ventures as opposed to combined ownership. Besen and O'Brien present a persuasive theoretical argument that the efficiencies of joint ownership of newspaper and television will likely exceed the efficiencies of joint ventures between the two.[768] The authors argue that joint ventures confront three classes of issues that hinder their ability to achieve efficient joint production: (1) the costs of reaching the agreement; (2) incentives to withhold private information; and (3) incentives to take actions that are not in the best interests of the joint venture. Besen and O'Brien maintain that joint ownership mitigates these possible hindrances. The prospective benefit of some media consolidation in the form of non-trivial efficiencies – and, conversely, the opportunity cost from the loss of such benefits through a rule prohibiting certain combinations – weigh against retention of our newspaper/broadcast cross-ownership rule. The authors provide no estimate of the value of these benefits.

347. Many commenters illustrate how combining a newspaper's local news-gathering resources with a broadcast platform contributes to, rather than detracts from, the production of local news programming that serves the community. These results follow from the particular journalistic experience associated with local daily newspapers, as well as the tangible economic efficiencies, such as sharing of technical support staff, which can be realized through common ownership of two media outlets. Such efficiencies may increase

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[767] *Id.*

[768] Gannett Comments in MM Docket No. 01-235, Exhibit C, Besen and O'Brien, *An Economic Analysis of the Efficiency Benefits from Newspaper/Broadcast Station Cross-Ownership.*

the amount of diverse, competitive news and local information available to the public, and allow the combined entities to compete more effectively in an increasingly fragmented and competitive market.[769]

348. There are several anecdotes in the record that illustrate how efficiencies resulting from cross-ownership translate into better local service. These efficiencies are particularly important as consumers demand almost instantaneous delivery of news – both locally and nationally – and even more in-depth coverage of complex issues.[770] Gannett, which owns a newspaper/television combination in Phoenix, Arizona,[771] reports that the quantity and diversity of area news coverage it provides has increased as a result of its ability to leverage the combined resources of the two outlets. According to Gannett, media integration has improved efficiency, particularly in situations characterized by fast-breaking news such as the

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[769] *See* The Times Comments in MM Docket No. 01-235 at 7-10, Ex. 3 (efficiencies in the Times' grandfathered combination reduce costs for, *e.g.*, training and employee benefits, which reduces pressure on advertising rates and frees up resources for programming efforts); *see also* ALTV Comments in MM Docket No. 01-235 at 7-8; Hearst Comments in MM Docket No. 01-235 at 16-18.

[770] *Compare* Edwin Emery & Michael Emery, THE PRESS AND AM. (5th ed. 1984) at 82 (reporting that it took six weeks for the news of the fighting at Lexington and Concord to reach Savannah, Georgia). Coverage of news events in the early press also tended to be brief, sometimes painfully so. One cannot but feel for the citizens of Philadelphia, for example, who were afforded only 43 words by the *Freeman's Journal* conveying the entire account of the final battle of the revolutionary war: "Be it remembered that on the 17th day of October, 1781, Lieut. Gen. Charles Earl Cornwallis, with about 5,000 British troops, surrendered themselves prisoners of war to His Excellency, Gen. George Washington, Commander-in-Chief of the allied forces of France and America." *See* Emery & Emery, THE PRESS AND AM. at 83 (citing Laurence Greene, AM. GOES TO PRESS (1936)).

[771] Gannett holds this combination pursuant to the retention period formula we instituted when we originally adopted the rule. *See 1975 Multiple Ownership Second Report and Order*, 50 F.C.C.2d at 1076 n. 25.

massive wildfires near Phoenix last year, while the journalists at each outlet retain discretion and exercise independent judgment.[772] Similarly, in Dallas, Texas, where Belo owns a newspaper/television combination,[773] both outlets have been able to cover a wider range of stories through information sharing between the separate newspaper and television news staffs.[774] Belo also operates TXCN, a 24-hour local cable news network, which uses its own news-gathering sources as well as those of Belo's other media properties in the market. This aggregation of news gathering and production resources, Belo asserts, has allowed it to provide more content, to innovate more in its reporting, and to provide more in-depth coverage of locally important issues than it otherwise could.[775]

349. Efficiencies not involving the sharing of news staffs may also be realized through cross-ownership. For example, Gannett explains that, if the restriction on newspaper/broadcast cross-ownership were removed, combinations could share back office expenses, such as accounting, marketing, and human resource functions.[776] Further, once a story has been assembled, the cost of distribution for another use is minimal, but the gains from incremental additional distribution can be

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[772] Gannett Comments at 8-11, Ex. A; Gannett Comments at 4-8, 18 (citing MOWG Study No. 7) and Exh. A (an affidavit from two local managers explaining the working relationships between commonly owned newspapers and broadcast stations in Phoenix, Arizona).

[773] This combination was "grandfathered" at the time of the rule's adoption.

[774] Belo Comments in MM Docket No. 01-235 at 4-7.

[775] *Id. See also* NAA Comments in MM Docket No. 01-235 at 23-24, 29-30, 34 (co-owned broadcast stations and newspapers have won multiple awards for their reporting); Bonneville Comments in MM Docket No. 01-235 at 5-6 (joint operation will result in better content and greater public service); Morris Comments in MM Docket No. 01-235 at 6-12 (co-owned outlets provide superior service); NAB Comments in MM Docket No. 01-235 at 34-43 (combinations are beneficial because, as operations in both entities are strengthened, they can provide better and more innovative media services).

[776] Gannett Comments in MM Docket No. 01-235 at 13-14.

large. This differential increases, rather than reduces, the incentives to create and expand the product sold -- in this case information.[777] As Cox argues, combinations at the local level result in efficiencies that allow media companies to serve their localities better and increase investment in local programming.[778]

350. Although our conclusions pertain to markets of all sizes, newspaper-broadcast combinations may produce tangible public benefits in smaller markets in particular. In this regard, West Virginia Media contends that the cross-ownership restriction impairs coverage of local news and public affairs in small markets by prohibiting combinations that would produce efficiencies and synergies particularly necessary in smaller markets.[779] It argues that the rule may have the unintended effect of stifling local news by prohibiting efficient combinations that would produce better output.[780] We assume that the efficiencies cited by West Virginia Media can benefit small businesses with respect to the production of news and public affairs programming.[781]

351. We disagree with those who argue that the relaxation or elimination of the newspaper/broadcast cross-ownership rule will create additional pressures on local news editors and

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[777] *Id.* at 16-19, Exhibit C; *see also* NAA Comments in MM Docket No. 01-235 at 16-22.

[778] Cox Comments at 73-74 (citing, *e.g.*, Schurz Comments in MM Docket No. 01-235 at 8; Gannett Comments in MM Docket No. 01-235 at 7).

[779] West Virginia Media Comments in MM Docket No. 01-235 at 7 (*citing* Bond & Pecaro, Inc., *A Study to Determine Certain Economic Implications of Broadcasting/Newspaper Cross-Ownership* (July 21, 1998) at 1); Bonneville Comments at 7-8.

[780] West Virginia Media Comments at 1-14 (citing Bond & Pecaro, Inc., *supra*); NAB Comments in MM Dkt. No. 98-35 at Appendix B ; *see also* Media General Comments at 71-75.

[781] In the Grandfathering and Transition Procedures Section VI(D), below, we adopt special provisions with respect to small businesses to further assist them.

directors to curtail coverage of public interest news.[782] For example, according to AFL-CIO, CanWest, whose daily newspapers comprise 30% of Canada's daily newspaper circulation, requires its big city newspapers to publish weekly editorials that are written by, and issued from, headquarters, and does not permit unsigned local editorials to contradict the headquarters editorials.[783]

352. As an initial matter, the issue raised by AFL-CIO regarding CanWest does not address cross-ownership within a market but, instead, addresses the perceived problems of national ownership and corporate centralization. Since our cross-ownership rule is not intended to address such problems, we need not address this argument. Moreover, it is hardly surprising, nor do we find it troubling, that newspaper owners use their media properties to express or advocate a viewpoint. To the contrary, since the beginning of the Republic, media outlets have been used by their owners to give voice to, among others, opinions unpopular or revolutionary,[784] to advocate

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[782] AFL-CIO Comments in MM Docket No. 01-235 at 8-14 (citing Kunkel and Roberts, *Leaving Readers Behind: The Age of Corporate Newspapering*, 23(4) AM. J. R. (May 1, 2001)); Consumers Union Comments in MM Docket No. 01-235 at 52-58; Mid-West Comments in MM Docket No. 01-235 at 3; AFL-CIO Comments at 44-46; NAHJ Comments at 16-17.

[783] AFL-CIO Comments at 44-46.

[784] Concerning the role of spokespersons in the media in the American Revolution, *see* Philip Davidson, PROPAGANDA & THE AMERICAN REVOLUTION (UNC Press, 1941); in the abolitionist movement, *see* Edwin & Michael Emery, THE PRESS & AMERICA: AN INTERPRETIVE HISTORY OF THE MASS MEDIA (Prentice Hall 1992) at 121-27 ("Emery & Emery"); in the "muck-raking" movement, *see* Ron Chernow, TITAN: THE LIFE OF JOHN D. ROCKEFELLER, SR. (Random House 1998) at 116-17, 435-53; in the rural populist movement, *see* Howard Zinn, A PEOPLE'S HISTORY OF THE UNITED STATES: 1492 – PRESENT (Harper Collins 2003) at 292 ("Zinn"); in the labor movement, *see The Labor Press Project*, http://faculty.washington.edu/gregoryj/laborpress/ (visited May 21, 2003); in the prohibition movement, *see* John Kobler, ARDENT SPIRITS: THE RISE AND FALL OF PROHIBITION (G.P. Putnam's Sons, 1973) at 42-47, 55-57, 98-101,

particular positions,[785] or to defend, sometimes stridently, social or governmental institutions.[786] Our broadcast ownership rules may not and should not discourage such activity. Nor is it particularly troubling that media properties do not always, or even frequently, avail themselves to others who may hold contrary opinions. Nothing requires them to do

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138-40, 153, 155, 158, 183; in the post-World War II conservative movement, *see* George H. Nash, THE CONSERVATIVE INTELLECTUAL MOVEMENT IN AMERICA SINCE 1945 (Basic Books 1976) at 148-60, and Rick Perlstein, BEFORE THE STORM: BARRY GOLDWATER & THE UNMAKING OF THE AMERICAN CONSENSUS (Hill & Wang 2001) at 114; in the counterculture and anti-Vietnam War movements of the 1960s and 1970s, *see* Ellen Frankfort, THE VOICE: LIFE AT THE VILLAGE VOICE (Morrow 1976), Kevin McAuliffe, THE GREAT AMERICAN NEWSPAPER: THE RISE & FALL OF THE VILLAGE VOICE (Charles Scribner's Sons, 1978); and Zinn, at 494; and in contemporary protest movements, *see* Greg Ruggiero & Stuart Sahulka (Eds.), THE PROGRESSIVE GUIDE TO ALTERNATIVE MEDIA & ACTIVISM (Seven Stories Press 1999); *see also* Ward L. Miner, WILLIAM GODDARD, NEWSPAPER-MAN (Duke U. Press 1962); Arthur Schlesinger, PRELUDE TO INDEPENDENCE, THE NEWSPAPER WAR ON BRITAIN, 1764-1776 (Knopf 1958); Walett, MASSACHUSETTS NEWSPAPERS AND THE REVOLUTIONARY CRISIS, *1763-1776* (Boston, MA Bicentennial Comm., 1974).

[785] Catherine D. Bowen, JOHN ADAMS AND THE AMERICAN REVOLUTION (Little Brown 1950); Milton Flower, John Dickinson, CONSERVATIVE REVOLUTIONARY (UVA Press, 1983); Robert Middlekauff, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763-1789 (Oxford U. Press, 1982); Clinton Rossiter, POLITICAL THOUGHT OF THE AMERICAN REVOLUTION (Harcourt Brace Jovanovich 1963); Maurice R. Cullen, Jr., *Benjamin Edes: Scourge of Tories*, J. Q. (Summer 1974) at 214.

[786] Edwin & Emery, *supra*. at 42-44 (concerning Tory newspaper publisher James Rivington). Other newspaper editors who championed causes passionately include William Randolph Hearst concerning many causes (*see* David Nasaw, THE CHIEF: THE LIFE OF WILLIAM RANDOLPH HEARST (Houghton Mifflin 2001)) and the late Katherine Graham of the Washington Post concerning the Watergate scandal (*see* Carl Bernstein & Bob Woodward, ALL THE PRESIDENT'S MEN (Touchstone/Simon & Schuster, New York, 1974)).

so,[787] nor is it necessarily healthy for public debate to pretend as though all ideas are of equal value entitled to equal airing. The media are not common carriers of speech.[788] It is hardly an indictment of the media to point out that an outlet may be a proponent of an identifiable editorial viewpoint. And the fact that such viewpoints may reflect popular opinion or have widespread appeal is not a ground for government intervention in the marketplace of ideas. Indeed, the very notion of a marketplace of ideas presupposes that some ideas will attract a following and achieve wide currency, while others quietly recede having failed to conquer the hearts and minds of the citizenry. Our Constitution forbids government action to pre-select the winners in this competition or to guarantee the circulation of any particular set of ideas.

353. Nor is it troubling that media properties may allow their news and editorial decisions to be driven by "the bottom line."[789] Again, the need and desire to produce revenue, to

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[787] *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). Broadcasters, however, are subject to certain statutory political broadcasting requirements. *See* 47 U.S.C. § 312(a)(7) (broadcast and DBS licensees must make available "reasonable access" to all legally qualified candidates for federal elective office); 47 U.S.C. § 315 ("equal opportunities" to competing legally qualified candidates). The Bipartisan Campaign Reform Act of 2002 contains several content-related provisions applicable to certain FCC regulatees. This Act is now being challenged before a special three Judge panel of the United States District Court for the District of Columbia *McConnell v. FEC*, Civ. No. 02-0582 (D.D.C. 2003).

[788] *See, e.g.*, 47 U.S.C. § 153(10) ("a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier").

[789] *See* CFA Comments at 255 (citing Cranberg, Gilbert, Randal Bezanson, John Soloski, TAKING STOCK: JOURNALISM AND THE PUBLICLY TRADED NEWSPAPER COMPANY, (Ames: Iowa State, 2001) at 89; and *The Business of News, the News About Business*, Neiman Reports, Summer 1999). It appears that by "[feeling] pressure from the bottom line," CFA means that editors are spending less time on the news and more of their time is being taken up with business concerns such as "plotting marketing strategies or cost-cutting campaigns." *Id.*

control costs, to survive and thrive in the marketplace is a time honored tradition in the American media. Indeed, it was not until newspaper publishers learned to market their papers as tools of commerce that the press became a force in the public debate that lead to the framing of our Constitution.[790] Impair the ability of media outlets to profit and you choke off the capital to which their tap roots reach; strangle the press and the balance of our familiar rights and privileges wither and fall.

354. In short, to assert that cross-owned properties will be engaged in profit maximizing behavior or that they will provide an outlet for viewpoints reflective of their owner's interests is merely to state truisms, neither of which warrants government intrusion into precious territory bounded off by the First Amendment. To the contrary, we are engaged in this exercise precisely because we seek to encourage the airing of diverse and antagonistic viewpoints. It would be odd indeed if our rules were structured to inhibit the expression of viewpoints or to promote only an accepted set of ideas. In light of the overwhelming evidence that combinations can promote the public interest by producing more and better overall local news coverage, we conclude that the current rule is not necessary to promote our localism goal and that it, in fact, is likely to hinder its attainment.

c. Diversity

355. The Commission adopted the newspaper/broadcast cross-ownership rule because it believed that diversification of ownership would promote diversification of viewpoint.[791] This proposition has been both defended and called into question. The Supreme Court found that the newspaper/broadcast cross-ownership rule could be sustained "so long as the regulations are not an unreasonable means for seeking to achieve these

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[790] Edwin and Michael Emery, THE PRESS AND AMERICA (5th Ed. 1984) 51-72.

[791] *1975 Multiple Ownership Second Report and Order*, *supra* note 33.

[public interest] goals."[792] Against the backdrop of the last 27 years' growth in the number, breadth, and scope of informational and entertainment media available and the benefits that may accrue from common ownership, we conclude that a blanket prohibition on the common ownership of broadcast stations and daily newspapers in all communities and in all circumstances can no longer be justified as necessary to achieve and protect diversity. Although we continue to believe that diversity of ownership can advance our goal of diversity of viewpoint, the local rules that we are adopting herein will sufficiently protect diversity of viewpoint while permitting efficiencies that can ultimately improve the quality and quantity of news and informational programming. Accordingly, we will eliminate the newspaper/broadcast cross-ownership prohibition and consider any such proposed merger in light of our new rules.

356. *Benefits of Common-Ownership.* As discussed above in connection with localism, the record indicates that cross-ownership of newspapers and broadcast outlets creates efficiencies and synergies that enhance the quality and viability of media outlets, thus enhancing the flow of news and information to the public.[793] Cox argues that co-ownership increases source diversity because it enables broadcasters to enhance their delivery of local programming, news, and

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[792] *NCCB*, 436 U.S. at 796.

[793] *See, e.g.*, News Corp. Comments in MM Docket No. 01-235 at 35-37 (since waiver of the rule in 1993, News Corp. has sustained the continued publication and expansion of the *New York Post*); BIC Comments in MM Docket No. 01-235 at 5-6 (broadcasters must grow and consolidate in order to survive and effectively serve the public); Norwell Comments in MM Docket No. 01-235 at 5-6 (economies of scale of combining a broadcast station and a daily newspaper are driven by marketplace realities of competing for limited advertising dollars); Can West Comments at 6 (print journalists can reach a wider audience over TV); Cox Comments at 71-72; of NAA Comments at 11-20 (co-owned affiliates offer superior news and informational content over non-co-owned affiliates).

information.[794] Others assert that the various synergies and profitable ventures between TV broadcasts and newspapers suggest that relaxing the newspaper cross-ownership rule could conceivably help struggling newspapers in some markets and perhaps provide economic justification for creation of newspapers.[795] Thus, relaxing the cross-ownership rule could lead to an increase in the number of newspapers in some markets and foster the development of important new sources of local news and information.[796]

357. Evidence that common ownership can enhance the flow of news and information to the public can be found in grandfathered newspaper-television combinations of which there are 21. Our review of the record indicates that such combinations often serve the public interest by adding information outlets and creating high quality news product. A recent study, for example, determined that, on average "grandfathered" newspaper-owned television stations, during earlier news day parts, led the market and delivered 43% more audience share than the second ranked station in the market and 193% more audience than the third ranked station in the market. These "grandfathered" structures also have created new information outlets in their market, such as Internet sites and local news-oriented cable networks.[797]

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[794] Cox does not address program diversity because it believes that program diversity is irrelevant to newspapers since they do not offer programming. Cox Comments at 71-72.

[795] Bear Stearns Comments at 40.

[796] Media General Comments at 13-21 (arguing that its convergence model has enabled it to deliver better, faster, and deeper local news in Tampa, Florida; Roanoke/TriCities, Virginia; Florence, South Carolina; Columbus, Ohio; and Panama City, Florida).

[797] Miller Comments in MM Docket No. 01-235 at 24-28, Ex. 8. The Miller study looked at only a few of the cross-owned newspaper/broadcast combinations, not all of them. Some commenters discount the importance of these new voices claiming that commonly-owned outlets do not contribute to

358. Moreover, empirical research confirms that newspaper/television combinations frequently do a superior job of providing news and informational programming. MOWG Study No. 7 found that network affiliated TV stations that are co-owned with a newspaper "experience noticeably greater success under our measures of quality and quantity of local news programming than other network affiliates."[798] Similarly, as described above, the Project for Excellence in Journalism's five-year study on local television news found "[s]tations with [newspaper] cross-ownership . . . were more than twice as likely as stations overall to generate "A" quality newscasts."[799] None of the cross-owned stations in the sample received an "F" grade in quality, as compared with 8% of all other stations.[800] It appears that the synergies and efficiencies that can be achieved by commonly located newspaper/broadcast combinations can and do lead to the production of more and qualitatively better news programming and the presentation of diverse viewpoints, as measured by third-parties.[801]

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viewpoint diversity. We address these arguments in the *Common Ownership/Common Viewpoint* section, *infra*.

[798] MOWG Study No. 7 at 2.

[799] PEJ Study, *supra* note 769 at 4, 10.

[800] *Id.* at 10.

[801] We recognize that quality can be subjective. However, both MOWG Study No. 7 and the PEJ Study attempted to use objective measurements of quality. In the case of the former, the number of Radio and Television News Directors Awards and A.I. DuPont Awards was measured. In the latter, a Design Team of 14 respected local television news professionals from a diverse cross-section of companies and regions around the country was assembled. This panel, through the use of survey questionnaires and long-form open-ended discussions developed 6 criteria for assessing the quality of newscasts including story balance via multiple sources and story balance via multiple viewpoints. Project for Excellence in Journalism, *"Does Ownership Matter in Local Television News: A Five-Year Study of Ownership and Quality"* (Feb. 17, 2003) at 2, 21 (Appendix III). *See also* PEJ's March 20, 2003, reply to Network's response.

359. *Harm to Diversity Caused by the Rule.* The newspaper/broadcast cross-ownership rule, as noted above, may be preventing efficient combinations that would allow for the production of high quality news coverage and broadcast programming, including coverage of local issues, thereby harming diversity.[802] Newspapers and local over-the-air television broadcasters alike have suffered audience declines in recent years.[803] In the broadcast area, commenters have reported declines in the ratings of existing outlets as more media enter the marketplace. For example, the number of television stations in the Miami-Ft. Lauderdale and the adjacent West Palm Beach markets has increased from 10 to 25 from 1975 to 2001.[804] As more stations have begun to program local news, however, the ratings for individual stations have dropped.[805] Broadcast groups owned by GE, Disney, Gannett, Hearst-Argyle and Belo have lost 10 to 15% of their aggregate audience in the past five years.[806] Local over-the-air broadcast TV's share of total television advertising dollars, which includes the new broadcast networks, new cable networks and syndication providers, has fallen from 56% in 1975 to 44% in 2000.[807] E.W. Scripps Company argues that consolidation among established media outlets and the proliferation of new media outlets since 1975 requires broadcasters and newspapers

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[802] FOEF Comments in MM Docket No. 01-235 at 22, Table 1, and 29-31; Herald Reply Comments in MM Docket No. 01-235 at 4-5.

[803] *Id.* at 1-2; *see also* NAB Comments in MM Docket No. 01-235 at 9-16, Att. 1 (audience share of traditional media has declined as the share of new outlets, particularly cable systems, DBS and MVPDs has increased).

[804] Tribune Comments in MM Docket No. 01-235 at 25-26. Tribune publishes the *South Florida Sun-Sentinel.*

[805] *Id.* at 26-27.

[806] Miller Comments in MM Docket No. 01-235 at 19-21, Exhibits 5, 6.

[807] *Id.* at 21-22, Exhibit 7.

to grow, consolidate, and achieve critical scale in their local markets to survive and effectively serve the public.[808]

360. Given the decline in newspaper readership and broadcast viewership/listenership, both newspaper and broadcast outlets may find that the efficiencies to be realized from common ownership will have a positive impact on their ability to provide news and coverage of local issues.[809] We must consider the impact of our rules on the strength of media outlets, particularly those that are primary sources of local news and information, as well as on the number of independently owned outlets. As West Virginia Media, states, for example, maximizing the number of independent voices does not further diversity if those voices lack the resources to create and publish news and public information.[810]

361. *Common Ownership/Common Viewpoint.* As suggested by MOWG Study No. 2,[811] authored by David Pritchard, commonly-owned newspapers and broadcast stations do not necessarily speak with a single, monolithic voice.[812] Although limited in scope, the Pritchard study found that in half of the 10 newspaper-television combinations studied, the overall slant of the coverage of a company's television station was noticeably different from the overall slant[813] of the coverage provided by

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[808] Scripps Comments in MM Docket No. 01-235 at 2.

[809] *See* West Virginia Media Comments at 14-23; Bonneville Comments at 7; Cox Comments at 71-72; Dispatch Comments at 7-9; Stapleton Comments at 14-15.

[810] West Virginia Media Comments in MM Docket No. 01-235 at 13-15.

[811] MOWG Study No. 2.

[812] Fox Comments at 54-55; NAB Comments at 62-63. *See also* Fox Comments in MM Docket No. 01-235 at 20-23; Gannett Comments at 9-14; Morris Comments at 8-9; NAA Comments at 11-20; Tribune Comments in MM Docket No. 01-235 at 42-47. Indeed, few broadcast stations overtly editorialize.

[813] In MOWG Study No. 2, Pritchard defines the "slant" of a published or broadcast item about the presidential campaign from the point of view of a

the same company's newspaper in the same market. While this does not permit us to conclude that common ownership never results in common slant, it does suggest that common ownership "does not result in a predictable pattern of news coverage and commentary about important political events in ... commonly owned outlets."[814] The results of the Prichard study are consistent with other anecdotal information supplied by commenters.[815]

362. Several parties assert that ownership affects editorial decisions and, ultimately, viewpoints expressed by media outlets.[816] As evidence, CFA points to Kim Fridkin Kahn and Patrick J. Kenny's paper, *The Slant of the News: How Editorial Endorsements Influence Campaign Coverage and Citizens' View of Candidates*,[817] which concludes that information on news pages is slanted in favor of the candidate endorsed on the newspaper's editorial page. CFA argues that combined entities are more likely to engage in biased reporting that goes unchecked by a disinterested rival. Issues affecting TV stations but not newspapers, it claims, might be discussed differently by independent newspapers and newspaper/TV combinations. It

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hypothetical interested but undecided voter. If the coders judged an item to be likely to make such a voter more inclined to vote for a candidate, the item was coded as "favorable" to that candidate. "Slant" was not a judgment about whether a candidate or his staff would have been happy with publication or broadcast of the item, about whether an item was somehow biased, or about a journalist's intent. It was simply an assessment of whether an item would have made a typical undecided voter more likely to vote for a candidate.

[814] MOWG Study No. 2.

[815] *See* Tribune Comments in MM Docket No. 01-235 at 43; *see also* Gannett Comments in MM Docket No. 01-235 at 11-13; Gannett Comments at 9-14; NAB Comments at 62-63 (*citing e.g.*, Hicks and Featherston, Duplication of Newspaper Content at 551-53).

[816] *See* AFL-CIO Reply Comments in MM Docket No. 01-235 at 13-20; UCC Comments in MM Docket No. 01-235 at 11.

[817] 96(2) AMERICAN POLITICAL SCIENCE REVIEW (June 2002).

argues that, due to excessive influence and conflicts of interest, cross-owned media fail repeatedly to exercise their "watchdog" function, as documented by experiences in a variety of communities.[818] Some opponents of elimination of the rule, arguing that common ownership will result in the common expression of viewpoint, attack the motives and objectivity of Dr. David Pritchard, author of MOWG Study No. 2.[819] Dr. Dean Baker asserts that MOWG Study No. 2 has serious methodological flaws and that when the results are properly analyzed seven of the ten combinations had a common slant.[820] CFA argues that "this is a remarkably high bias and underscores the problem of common ownership across the media."[821] Other critics of MOWG Study No. 2 claim that its results cannot be generalized to all broadcast/newspaper combinations because the study examined only a small sample of cases and the author failed to include a "control" group of independently-owned broadcast stations and newspapers for comparison.[822]

363. Various parties submit anecdotal evidence purporting to show that ownership either does or does not influence viewpoint. For example, in an effort to show that ownership does influence viewpoint, AFL-CIO reports that Pulitzer winner Sydney Schanberg's column in *The New York Times* was canceled when he criticized the press for ignoring a major real estate scandal in New York;[823] the publisher of Hearst's *San Francisco Examiner* allegedly promised to stem his paper's criticism of Mayor Willie Brown if the mayor did not oppose

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[818] CFA Comments at 225-34.

[819] *See, e.g.*, AFL-CIO Comments at 36-43; AFTRA Comments at 28-32; CFA Comments at 221-24; CWA Comments at 29-34.

[820] AFL-CIO Comments, *Democracy Unhinged* at 5-7.

[821] CFA Comments at 47-48 n.68.

[822] *See, e.g., Democracy Unhinged.*

[823] AFL-CIO Comments at 22 (citing Northwest Passage Productions in association with KTEH, *Fear and Favor in the Newsroom*).

Hearst's takeover of its rival, the *Chronicle*;[824] and the *Los Angeles Times* failed to report a controversial real estate and recreational project that benefited the *Times'* parent, *Times-Mirror*, although the story was reported by other papers, including *The New York Times* and *The Bakersfield Californian*.[825] CWA argues that ownership influences viewpoint, and even reduces viewpoint diversity.[826] The record also includes anecdotes to the contrary, and those supplying these anecdotes are equally adamant that ownership does not influence viewpoint. For example, Tribune states that all of its newspapers did not endorse the same candidate in the 2000 presidential election.[827]

364. Suffice to say, although there is evidence to suggest that ownership influences viewpoint, the degree to which it does so cannot be established with any certitude. In order to sustain a blanket prohibition on cross-ownership, we would need, among other things, a high degree of confidence that cross-owned properties were likely to demonstrate uniform bias. The record does not support such a conclusion. Indeed, as the market becomes more fragmented and competitive, media owners face increasing pressure to differentiate their products, including by means of differing viewpoints. While such differentiation may occur, however, our analysis does not turn on that premise, and it is not determinative of our decision

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[824] *Id.* (citing Thomas Kunkel and Gene Roberts, *Leaving Readers Behind: The Age of Corporate Newspapering*, 23(4) AM J R 36 (May 1, 2001).

[825] *Id.* (citing Ben Bagdikian, THE MEDIA MONOPOLY (6th ed.) (Boston: Beacon Press 2000) at 39-41).

[826] CWA Comments at 29-40 (citing Marion Just and Rosalind Levine, *"News for Sale." Special Report: Local TV News*, COL J. REV./PEJ (Nov./Dec. 2001) at 2-3; DeNeen L. Brown, *Canadian Publisher Raises Hackles: Family is Accused of Trying to Restrict Local Newspapers' Autonomy*, WASHINGTON POST (Jan. 27, 2002) at A25); *see also* CFA Comments at 34-40, 225-34.

[827] Tribune Comments in MM Docket No. 01-235 at 43. *See also* Gannett Comments in MM Docket No. 01-235 at 11-13; Gannett Comments at 9-14.

with respect to our current newspaper/broadcast cross-ownership rule. Our analysis turns, rather, on the availability of other news and informational outlets. Thus, while we do not dispute that a particular outlet may betray some bias, particularly in matters that may affect the private or pecuniary interest of its corporate parent (*e.g.*, such as when an outlet has an interest in a real estate transaction or is being criticized in an op-ed), such anecdotes do not show a pattern of bias in the vast majority of news comment and coverage where such self-interest is not implicated. Nor, moreover, do such incidents mean that the public was left uninformed about the situation by other available media. Therefore, it would seem that the remedy for any such "bias" is the provision of antagonistic viewpoint we seek to advance.

365. *Available Media.* The record in this proceeding provides ample evidence that competing media outlets abound in markets of all sizes – each providing a platform for civic discourse.[828] Television and radio stations, both commercial and noncommercial, are important media for news, information, entertainment, and political speech.[829] Cable television systems, which originated as passive conduits of broadcast programming, have expanded to carry national satellite-

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[828] *See* Media Marketplace Section IV, *supra; see also* MOWG Study No. 1; MOWG Study No. 3 at 3, 18; MOWG Study No. 8 at Table 1; Appendix D; Gannett Comments at 9-14 (consumers use a variety of media to obtain news and information).

[829] Gannett Comments at 10-11. *See also* Andrea M.L. Perrella, THE POLITICAL INFLUENCE OF TALK RADIO (Université de Montréal, 1995) ("Talk radio has grown . . . from a fringe radio format to a lucrative industry and a noticeable actor in recent American politics. Talk radio has played a vocal role during the 1992 presidential election and the 1994 mid-term elections, with many people both in and out of politics attributing the Republican Party's 1994 election sweep to buoyant conservative talk-radio hosts."); Amy Ridenour, *President of The National Center for Public Policy Research*, Press Release (Nov. 20, 2002) ("Talk radio is America's town hall"). *But see* Consumers Union/MAP Reply Comments at 21-23 (claiming that radio stations are no longer a major voice in civic discourse).

delivered networks. Many also carry local public, educational, and governmental channels. Cable systems in larger markets are now evolving into platforms for original local news and public affairs programming.[830] Daily newspapers, while declining in number, continue to provide an important outlet for local and national news and expression.[831] The Internet, too, is becoming a commonly-used source for news, commentary, community affairs, and national/international information.[832] Seventy-two percent of Americans are now online and spend an average of nine hours weekly on the Internet.[833] MOWG Study No. 3 suggests that consumers generally view Internet news sources as a substitute for daily newspapers and broadcast news.[834] We cannot but conclude that, notwithstanding the claims of supporters of retention of the newspaper/broadcast rule,[835] the Internet does play an important role in the available media mix.[836]

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[830] The first local/regional cable news channels began in the mid-1980s; today there are 32 cable news channels. *See* NCTA, *Regional Cable Networks*, Cable Developments (2002) at 171-94.

[831] CFA Comments at 159-62.

[832] *See, e.g.*, Media General Reply Comments in MM Docket No. 01-235 at 8-11 (Internet a surrogate for local newspapers with over half of the nation having access to the Internet) (citing, NTIA, *A Nation Online: How Americans are Expanding Their Use of the Internet* (Feb. 2002)); *see also* NAB Reply Comments in MM Docket No. 01-235 at 8-10; Hearst Comments in MM Docket No. 01-235 at 10-11.

[833] *See, e.g.*, Hearst Comments in MM Docket No. 01-235 at 10-11.

[834] *See* MOWG Study No. 3. We recognize, however, that many television stations and newspapers also distribute their content via the Internet.

[835] UCC Comments in MM Docket No. 01-235 at 17-19, Att. 10 (Internet not effective news or advertising substitute for broadcast stations or daily newspapers); CU Comments in MM Docket No. 01-235 at 65-96 (diversity not assured by competition across media products); AFL-CIO Comments at 34-36 (arguing that more than 60% of Americans watch broadcast news, and about 62 percent of Americans read a daily newspaper, while other media do not have comparable reach, and half of all Americans do not have Internet connections at home); CWA Comments at 5-9, *citing* MOWG Studies Nos.

366. We disagree with parties that assert that there is little diversity in media markets.[837] The average American has a far richer and more varied range of media voices from which to choose today than at any time in history. Given the growth in available media outlets, the influence of any single viewpoint source is sharply attenuated. AFL-CIO argues to the contrary, asserting that the growth rate of media outlets is slowing.[838] The slowing of the growth rate is attributable, at least in part however, to the lack of available spectrum to maintain the tremendous growth in broadcast outlets recently experienced. CFA argues that only a large number of independent owners – "diverse and antagonistic sources" – will provide sufficiently diverse viewpoints for effective public discourse.[839] It estimates that elimination of the rule would result in approximately 200 newspapers merging with broadcasters, reducing the number of independent outlets available.[840] This, some commenters allege, will cause a reduction in viewpoint diversity.[841] We agree that diversity of ownership can promote a diversity of viewpoints and recognize that absent the current

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3 and 8 (Internet not a mass medium and most people use Internet news sites for non-local news).

[836] Major media providers need no convincing, as virtually all of them have rushed to create webpages in an effort to capture a segment of this incipient market. For example, MSNBC, Fox News, CNN, the major broadcast television networks and many newspapers all now maintain websites.

[837] *See, e.g.*, AFL-CIO Reply Comments in MM Docket No. 01-235 at 11-12; UCC Comments in MM Docket No. 01-235 at 2-8, Attachments 2, 3 (purporting to show that local broadcast media have become less diverse and more concentrated between 1993 and 2001); UCC Reply Comments in MM Docket No. 01-235 at 24-26, Attachments.

[838] AFL-CIO Comments at 1-3.

[839] CFA Comments at 283.

[840] *Id.* at 244-46.

[841] *See, e.g.*, AFL-CIO Comments at 36-43; AFTRA Comments at 28-32; CFA Comments at 221-24; CWA Comments at 29-40 (citing, *e.g.*, Brown, *supra* note 829.

rule there will be some consolidation. We conclude, however, that our new local rules will protect the diversity of voices essential to achieving our policy objectives. A blanket prohibition on newspaper-broadcast combinations, however, can no longer be sustained.

367. In short, the magnitude of the growth in local media voices shows that there will be a plethora of voices in most or all markets absent the rule. Indeed, the question confronting media companies today is not whether they will be able to dominate the distribution of news and information in any market, but whether they will be able to be heard at all among the cacophony of voices vying for the attention of Americans.[842] Our rules should account for these changes and promote, rather than inhibit, the ability of media outlets to survive and thrive in this evolving media landscape.[843] They must "give recognition to the changes which have taken place and to see to it that [they] adequately reflect the situation as it is, not was."[844]

d. Conclusion

368. As discussed above, we find that a newspaper-broadcast combination cannot adversely affect competition in any relevant product market and, thus, we cannot conclude that the current newspaper-broadcast cross-ownership rule is necessary to promote competition. Similarly, we conclude that the evidence in the record of this proceeding demonstrates that combinations can promote the public interest by producing more and better overall local news coverage and that the current rule is thus not necessary to promote our localism goal. Instead, we find that it, in fact, is likely to hinder its

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[842] Tribune Comments in MM Docket No. 01-235 at 36-38.

[843] *See, e.g.*, S. Rep. No. 104-23, 104th Cong., 1st Sess. at 64 (1995) (statement of Sen. Burns) (the industry is "now operating under archaic rules that are better suited the 1950s than the 1990s").

[844] *1975 Multiple Ownership Second Report and Order*, 50 F.C.C.2d at 1075.

attainment. Finally, the record does not contain data or other information demonstrating that common ownership of broadcast stations and daily newspapers in the same community poses a widespread threat to diversity of viewpoint or programming.[845]

369. As outlined above, the types of media and the number of outlets within each media, except daily newspapers, have increased dramatically in the past twenty years. In addition, evidence shows that the link between common ownership of newspapers and broadcast outlets and common viewpoint is tenuous, ill-defined, and difficult to measure. In any event, we do not think that the current rule is necessary to preserve diversity of viewpoint. The local cross-media limits adopted herein are more precisely targeted at specific types of markets in which particular combinations are most likely to harm diversity. We conclude, therefore, that the current rule is no longer necessary in the public interest.[846]

2. Radio/Television Cross-Ownership Rule

370. The radio/television cross-ownership rule limits the number of commercial radio and television stations an entity may own in a local market. Currently, the rule allows a party to own up to two television stations (provided it is permitted under the television duopoly rule) and up to six radio stations

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[845] *See* CanWest Comments in MM Docket No. 01-235 at Appendix A (no structural link between the number of owners and the degree of diversity); NAB Comments in MM Docket No. 01-235 at 20-26 (citing David Haddock and Daniel Polsby, *Bright Lines, the Federal Communications Commission's Duopoly Rule and the Diversity of Voices*, 42 FED COMM L. J. 331 (1990); Benjamin Compaine, *The Impact of Ownership on Content: Does It Matter?*, 13 CARDOZO ARTS & ENT. L. J. 755 (1995)).

[846] On March 11, 2003, Media General, Inc., filed a "Motion to Bifurcate and Repeal." That Motion asked the Commission to break the newspaper/broadcast cross-ownership rule out of the biennial review, and repeal the rule, if it could not act in the biennial review in the spring of 2003. Because we are acting in the biennial review in the spring of 2003 and are repealing the subject rule, we dismiss Media General's Motion as moot.

(to the extent permitted under the local radio ownership rule) in a market where at least 20 independently owned media voices[847] would remain post-merger. Where parties may own a combination of two television stations and six radio stations, the rule allows a party alternatively to own one television station and seven radio stations. A party may own up to two television stations (as permitted under the current television duopoly rule) and up to four radio stations (as permitted under the local radio ownership rule) in markets where, post-merger, at least ten independently owned media voices would remain. A combination of one television station and one radio station is allowed regardless of the number of voices remaining in the market.[848]

371. Based on the record in this proceeding, we do not find that the radio/television cross-ownership rule remains necessary in the public interest to ensure competition, diversity or localism. Our decision reflects the substantial growth and availability of media outlets in local markets, as well as the potential for significant efficiencies and public interest benefits to be realized through joint ownership. We find that our diversity and competition goals will be adequately protected by the local ownership rules adopted herein.

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[847] Media voices include (1) independently owned and operating full-power broadcast television stations within the DMA of the television station's community of license that have Grade B signal contours that overlap with the Grade B signal contour of the television station at issue; (2) independently owned and operating broadcast radio stations that are in the radio metro market of the television station's community of license or the radio station's community of license; (3) independently owned out-of-market broadcast radio stations with a minimum share as reported by Arbitron; (4) English-language newspapers that are published at least four days a week within the television station's DMA and that have a circulation exceeding 5 percent of the households in the DMA; and (5) one cable system, if cable television is generally available to households in the DMA. Cable television counts as only one voice in the DMA, regardless of how many individual cable systems operate in the DMA. 47 C.F.R. § 73.3555(c)(3).

[848] 47 C.F. R. § 73.3555(c).

372. *Background.* In 1970, the Commission restricted the combined ownership of radio and television stations in local markets.[849] The purpose of the rule (originally referred to as the one-to-a-market rule) was twofold: (1) to foster maximum competition in broadcasting, and (2) to promote diversification of programming sources and viewpoints.[850] In 1995, the Commission requested comment to determine whether the cross-ownership limitations were still warranted in light of the then current market conditions.[851] Before the Commission issued a decision, Congress passed the 1996 Act.[852] Section 202(d) of the 1996 Act required the Commission to extend the radio-television cross-ownership presumptive waiver policy to the top 50 television markets "consistent with the public interest, convenience and necessity." Prior to implementing the statutory change, we issued a *Second Further Notice* requesting comment on whether modification of the rule was warranted beyond the Section 202(d) requirements.[853] We asked whether, instead of just extending the waiver policy to the top 50 markets, we should eliminate the rule in its entirety based on a finding that radio and television do not compete in the same market. We also asked whether television and radio

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[849] Originally, the rule prohibited the common ownership of commercial radio and television stations in the same market if the 2 mV/m contour of an AM station or the 1 mV/m contour of an FM station encompassed the entire community of license of a television station or, if the Grade A contour of a television station encompassed the entire community of license of an AM or FM station. *Amendment of Section 73.35, 73.340 and 73.630 of the Commission's Rule Relating to Multiple Ownership of Standard, FM and TV Broadcast Stations*, 22 F.C.C.2d 306, 308 ¶ 8 (1970) ("*1970 Multiple Ownership First Report and Order*").

[850] *Id.* at 307 ¶ 3.

[851] *TV Ownership FNPRM*, *supra*.

[852] *See* note 1, *supra*.

[853] *Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules*, 11 FCC Rcd 21655, 21682-89 ¶¶ 59-89 (1996) ("*TV Second FNPRM*").

stations should be considered competitors, and if the radio/television cross-ownership rule could be eliminated because the respective radio and television ownership rules alone sufficed to ensure sufficient diversity and competition in the local market.[854] In the event we found that the cross-ownership rule was necessary, we sought comment on specific options for modification of the rule.[855]

373. In 1999, the Commission modified the rule to its current form.[856] We found that the growth of media outlets and cable systems, the efficiencies of joint ownership, and the public service benefits obtained from joint operations all supported our decision to allow additional common ownership of radio and television stations.[857] Although we decided not to eliminate the rule, we stated that we would continue to monitor the impact of the broadcast ownership rules on the industry and that we would further consider relaxation of the radio/television cross-ownership rule in future biennial reviews.[858] In June 2000, we released the *1998 Biennial Report*, where we concluded that further relaxation of the broadcast ownership rules was not then warranted.[859] In light of the 1999 relaxation of the broadcast ownership rules, we decided to proceed cautiously and monitor the impact of the new rules on diversity and competition.[860]

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[854] *Id.* at 21684 ¶ 63.

[855] *Id.* at 21685-87 ¶¶ 65-71.

[856] *Local TV Ownership Report and Order*, *supra* note 96. Also in the Local TV Ownership Report and Order we eliminated the five factor case-by-case waiver standard. Currently, waivers are granted only in situations involving a "failed station" or other extraordinary circumstances.

[857] *Id.* at 12948 ¶ 102.

[858] *Id.* at 12949 ¶ 106.

[859] *1998 Biennial Review Report*, 15 FCC Rcd at 11073 ¶ 26.

[860] In the 2000 Biennial Review proceeding, the Commission did not alter the recommendations it had made in the 1998 Biennial Review proceeding with respect to the radio/television cross-ownership rules. *See 2000 Biennial*

374. Under our statutory mandate pursuant to Section 202(h) of the 1996 Act, we are required to consider biennially whether "to 'repeal or modify' any rule that is not 'necessary in the public interest.'"[861] In determining whether the rule meets this standard, we consider whether it is necessary to promote any of our public interest objectives.[862] With respect to cross-ownership of radio and television stations in the same market, we reexamine the impact of the rule on competition, localism and diversity.

a. Competition

375. *The Product Market.* To assess the competitive impact of our radio/television cross-ownership rule, we need to determine whether radio and television stations compete for sources of revenue generation – in this case, advertising.[863] If we find that they do, *i.e.*, that a significant number of advertisers consider radio and television to be good substitutes,

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Regulatory Review, *supra*, note 512.

[861] *Fox Television*, 280 F.3d at 1042.

[862] *Id.*

[863] The competitive analysis for both the local radio and the local television ownership rules focuses on two additional markets, delivered programming and programming production. However, in analyzing the effects of combined ownership of radio and television stations in a local market, neither of the latter product markets is relevant. Radio and television broadcasting are distinct programming markets with little overlap. The bulk of video entertainment and news programming available on commercial television is not suitable for radio. Similarly, audio radio programming, which is predominately music and talk show formats, cannot be replicated on television. Thus, because the essential nature of each medium determines the type of programming each medium broadcasts, the content is not interchangeable. Authors Lin and Jeffres used media websites to analyze the programming of newspapers, radio stations, and television stations in 25 of the largest metro markets in the US. They concluded that each medium has a relatively distinctive content emphasis. *See* Carolyn A. Lin and Leo W. Jeffres, *Comparing Distinctions and Similarities across Websites of Newspapers, Radio Stations, and Television Stations*, J MASS COMM Q (Columbia; Autumn 2001) at 555-573.

then our concern would be that elimination or relaxation of the cross-ownership restrictions may enable a single firm to acquire sufficient market power to hinder small and independent broadcasters' efforts to generate revenue, and thereby put their continued viability at risk. However, if radio and television are not in the same product market, then we would have little concern that elimination or relaxation of the rule would have any negative effects on competition. Broadcasters compete with each other for audience share by offering quality programming of interest to local communities. Higher audience shares, in turn, attract advertisers, and thus, enable radio and television stations to generate revenue. Our continuing goal is to ensure that our rules and policies foster, rather than hinder, broadcasters' incentives and ability to compete for advertising revenues by providing consumers with innovative and quality programming, news, and information.

376. In the *Notice* we asked commenters to provide us with evidence regarding the degree to which radio serves as an economic substitute for broadcast television.[864] We noted that evidence showing radio and television are not economic substitutes would support relaxation or elimination of the current rule. The *DOJ/FTC Guidelines*[865] define the relevant product market as the smallest group of competing products for which a hypothetical monopoly provider of the products would profitably impose at least a "small but significant and non-transitory price increase," presuming no change in the terms of sale of other products.[866] Thus, when one product is a reasonable substitute for the other in the eyes of consumers, it is to be included in the relevant product market even though the products themselves are not identical.[867] In the *Local Radio*

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[864] *Notice*, 17 FCC Rcd at 18537 ¶ 104.

[865] *DOJ/FTC Guidelines*, *supra* note 285.

[866] *Id.* § 1.11.

[867] *Id.* § 1.12. *See, e.g., EchoStar/DirecTV HDO*, 17 FCC Rcd at 20605-06 ¶ 106.

Ownership NPRM, we noted that the Department of Justice views radio as a discrete market, "finding that advertisers find value in certain of radio's unique attributes."[868]

377. As described in greater detail above, we conclude that most advertisers do not consider radio and television stations to be good substitutes for advertising and, therefore, that generally combinations of these two types of media outlets likely would not result in competitive harm.[869] Again, in MOWG Study No. 10, Anthony Bush found weak substitutability between local media, including radio and television. In separately filed comments, both Professor Jerry Hausman and Dr. Bruce M. Owen criticize Bush for using national and regional, rather than local, advertising price data.[870] As we noted above, we recognize the limitations of the SQAD data but believe the effects of these measurement errors may cancel out such that

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[868] *Local Radio Ownership NPRM*, 16 FCC Rcd at 19879 ¶ 42.

[869] CWA agrees that newspapers, television and radio are distinct and separate media product markets, with weak substitution by consumers and advertisers. CWA also urges the Commission to adopt structural rules that place ownership limits on each distinct media type. See CWA Comments at 2-3, 46. In rare instances, advertisers may consider radio and television to be good substitutes. Buckley, for example, states that competition between radio and television advertising exists in smaller markets, such as in the Monterey-Salinas market, where radio and television advertising rates are approximately the same during certain times of the day. *See* Buckley Comments at 3. The local television ownership rule and the local radio ownership rule will prevent any one entity from owning all of the broadcast television stations or all the broadcast radio stations in a local market. Thus, those advertisers that consider radio and broadcast stations to be good substitutes, and play these media against one another to negotiate a good price, would continue to have access to these separately owned broadcast stations.

[870] *See* Clear Channel Comments in MM Docket No. 01-317 at 20-22, Exh. 6 at 5-8; Fox Comments, Owen Statement; *see also* NAB Comments in MM Docket No. 01-317 at 30-33. These comments were submitted in the local radio proceeding, and do not discuss the relevant product market for the radio/television cross-ownership rule.

the estimates of Bush are unbiased. We weight the study accordingly and consider the other evidence on the record.

378. Moreover, other studies confirm Bush's conclusion that advertisers do not consider radio and television to be good substitutes. Silk, Klein, and Berndt (2002) examine advertising in the national markets for eight different media outlets: magazines, newspapers, network television, spot television, network radio, spot radio, outdoor billboards, and direct mail.[871] The authors find that for advertisers in national markets, radio and television are weak substitutes. Reid and King (2000) used survey and interview methods to examine advertising managers' opinions of media substitutability.[872] Their reports suggest that managers consider radio and broadcast television to be weak substitutes.

379. In addition to the empirical evidence, differences between radio and television programming and formats suggest that they do not compete in the same product market. First, in any given market, radio stations can market and distinguish themselves to potential listeners through their identification with a particular format.[873] These formats allow radio advertisers to target specific demographics much more precisely than they can when they advertise on television. In addition, viewers and listeners experience these two mediums differently. Television uses both sight and sound to allow advertisers to reach their audience in a relatively comprehensive way. As an audio medium, radio is more limited. As a result, radio and television broadcast distinct programming. Video is not suitable for radio and vice versa. The difference is important for viewers and advertisers alike.

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[871] Silk, Klein, and Berndt, *supra* note 522.

[872] Reid and King, *supra* note 523.

[873] Country, jazz, urban, pop, and rock are examples of these radio formats.

380. The essential nature of each medium determines, in large measure, the type of programming each will broadcast.[874] For example, a car dealership or furniture warehouse wishing to quickly create strong brand recognition will likely place greater value on television ads where potential customers see the products, as opposed to using radio ads. Radio listeners are seldom completely engaged to listening because simultaneously they are perhaps, driving, working, cleaning, dining, or shopping. Thus, some advertisers may prefer, while others avoid, the radio listener as a significant audience to target. Additionally, television advertisements typically are more expensive than radio ads, suggesting that advertisers could not easily switch between the two mediums. Recent data suggest that an average 30 second evening television spot costs approximately $19 per thousand viewers, while on radio, the same spot costs approximately $11.[875] Radio stations typically do not garner the size audiences that television stations do, thus, making the 30 second television spot considerably more expensive than a radio spot. Small-scale, local establishments likely will find radio to be more affordable.

381. In sum, television and radio stations neither compete in the same product market nor do they bear any vertical relation to one another.[876] A television-radio combination, therefore, cannot adversely affect competition in any relevant product market. Accordingly, we cannot conclude that the current

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[874] MOWG Study No. 3 studies a number of different specifications for consumers of TV and radio and finds either weak or no substitution between these two media.

[875] Data represent average cost per thousand viewers or listeners during prime time for third quarter, 2002. Source of data is SQAD. For explanation of SQAD data see note 736, *supra*.

[876] Generally we identify both the product and the geographic markets. Because we find that radio and television advertising are separate product markets, it is not necessary to define the geographic market for these purposes.

television-radio cross-ownership rule is necessary to promote competition.

b. Localism

382. In the *Notice*, we sought comment on how cross-ownership limitations affect localism, as measured by the quantity and quality of news and public affairs programming that stations provide to local communities.[877] We sought comment on the quantities of local news and public affairs programming provided by radio and television combinations as opposed to stand-alone stations in the same markets. We asked whether radio and television combinations produce more, less, or the same amount of news programming than stand-alone stations. We also asked commenters to address the implications of any such differences. We find that by prohibiting combinations of news gathering resources between radio and television stations, the current rule prohibits owners from maximizing local news and information production, which would benefit consumers.

383. There is no compelling or substantial evidence in the record that the rule is necessary to protect localism. The record in this proceeding, in fact, includes evidence to the contrary – that efficiencies and cost savings realized from joint ownership may allow radio and television stations to offer more news reporting generally, and more local news reporting specifically, than otherwise may be possible. The record in this proceeding suggests that station owners will use additional revenue and resource savings from television-radio combinations to provide new and innovative programming, provide more in-depth local interest programming, and provide better service to the public, including locally oriented services.[878] As discussed in the

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[877] *Notice*, 17 FCC Rcd at 18537 ¶ 103.

[878] Duhamel Comments at 1, 6; *see generally*, Clear Channel Comments in MM Docket No. 01-317 at 23; Cumulus Comments in MM Docket No. 01-317 at 5-6; Viacom Comments in MM Docket No. 01-317 at 62-64; NAB Comments in MM Docket No. 01-317 at 43-45.

Diversity Index section, consumers rely on both radio and television for coverage of news and public affairs.[879] Therefore, consumers will benefit from a policy which allows radio and television owners to maximize these offerings.

384. Some commenters assert that independent owners expend more resources to air local programming or produce more news and public affairs programming than do owners of combined stations.[880] Further, some commenters contend that cross-ownership of radio and television stations in local markets leads to reduced independent news and public affairs programming, more syndicated programming,[881] reductions of staff, cross-assigned journalists, re-use and re-purposing of content, and increased amounts of on-air advertising time.[882]

385. These parties have failed to show that the rule remains necessary in the public interest. First, isolated anecdotes of changes in news programming schedules following a

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[879] MOWG Study No. 8; *see also* Diversity Index, Section VI(C)(3), *infra*.

[880] UCC Comments at 40-41. UCC points to Clear Channel's 2002 acquisition of the Ackerley Group, in which Clear Channel acquired 16 television stations, and created new radio and television combinations in eleven communities. Post-merger, UCC argues that in Watertown, New York, Clear Channel replaced the television station's morning, noon and weekend news broadcasts with a morning news show produced in Birmingham. UCC also complains that Clear Channel replaced its local news telecasts on stations in Binghampton and Utica with regional news programs. However, without additional information, it is impossible to evaluate the actual reasons for the programming changes or effect of the changes on the aggregate news programming produced and distributed by the Clear Channel stations in the market.

[881] AFTRA Comments in MM Docket No. 01-317 at 12. AFTRA believes that syndicated programming does not serve the interests of local communities. *See also* AFTRA Comments at 12-15 regarding the sharing of news product between different local outlets.

[882] *Id.* at 5-8. AFTRA cites CBS/Infinity's acquisition of Group W/Westinghouse, which resulted in the cross-ownership of television and radio stations in the Chicago market. AFTRA states that CBS proposes to cross-assign news reporters for television and its seven radio stations.

transaction do not provide the kind of systematic empirical evidence necessary to support a general allegation that cross-owned stations produce lesser quantities of news, or news of lower quality, than do non-cross-owned stations. Second, shared support staff and conservation of resources does not necessarily mean a reduction in local news. The efficiencies derived from some of these practices may in fact, increase the amount of diverse, competitive news and local information available to the public.[883] Thus, the record does not demonstrate that the current rule specifically promotes localism, or that elimination of the rule would harm it.

c. Diversity

386. We asked in the *Notice* whether the cross-ownership rule is necessary to foster viewpoint diversity in today's media marketplace.[884] We sought comment on the types of media that contribute to viewpoint diversity and how the cross-ownership rule affects viewpoint diversity.[885] We noted that the current rule counts as a media voice commercial and non-commercial broadcast television and radio stations, certain daily newspapers, and cable systems. We asked whether additional types of media should also be counted as contributing to viewpoint diversity, such as the Internet, DBS, cable overbuilders, individual cable networks, magazines, and weekly newspapers.

387. As discussed above, in today's media market there are more media outlets than ever before.[886] The Commission has previously concluded that "the information market relevant to

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[883] We received substantially more comments on this issue in the context of the newspaper/broadcast cross-ownership rule. There, the record suggests that the newspaper/broadcast cross-ownership rule impedes efficiencies that might otherwise benefit the public. We believe that the same is true in the context of radio and television combinations.

[884] *Notice*, 17 FCC Rcd at 18536 ¶ 100.

[885] *Id.* at 18536-37 ¶ 102.

[886] *See* Media Marketplace, Section IV, *supra*.

diversity includes not only television and radio outlets, but cable, other video media and numerous print media as well."[887] Not only have we seen an increase in the types of outlets available, but local markets have also experienced enormous growth in broadcast outlets. The record shows that in local broadcast markets of all sizes the numbers of radio and television stations have increased over the years.[888]

388. We conclude that the current television/radio cross-ownership rule is not necessary to ensure viewpoint diversity. As CanWest explains, we should not view specific markets in a vacuum for diversity purposes, but rather should consider that households get information from many sources.[889] Thus, we agree with the commenters that argue that a cross-ownership rule applicable only to radio and television is "inequitable and outdated."[890] Although several commenters argue that retention of the radio/television cross-ownership rule is necessary to protect the availability of diverse views, information, and local programming,[891] we believe that a rule limited to just radio and television fails to take into account all of the other relevant media in local markets available to consumers.

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[887] *See 1984 Multiple Ownership Report and Order*, 100 F.C.C.2d at 25; *See* Viacom's Petition for Rulemaking (May 23, 2002) at 7; Clear Channel Comments at 5; NAB Comments at 68; Fox Comments at 58.

[888] *See* Media Marketplace, Section IV, *supra*; MOWG Study No. 1.

[889] CanWest Comments at 3. CanWest notes that cross-ownership in Canada has strengthened media companies and has encouraged greater diversity and more sources of information. *Id.* at 6.

[890] *See, e.g.*, NAB Comments at 69-70.

[891] Desmond Reply Comments at 7; AFTRA Comments at 10-11; CWA Comments at 2-3, 46; Nancy Stapleton Comments at 10-11, 16; *see also* Children Now Comments at 3-4 (if the Commission relaxes the cross-ownership rule, it should analyze the impact of proposed media mergers on children).

389. We agree with the commenters, however, that fostering the availability of diverse viewpoints remains an important policy goal, and that diversity of ownership promotes diversity of viewpoints. We are adopting modified service-specific local ownership rules that will protect and promote competition in the local television and radio markets and, as a result, will also protect and preserve viewpoint diversity within those services. In addition, we are adopting a new cross-media limit rule, described below, that is specifically designed to protect diversity of viewpoint in those markets in which we believe consolidation of media ownership could jeopardize such diversity. The local rules we are adopting in this *Order* are designed to reflect the substantial growth and availability of media outlets in local markets, and to account for concentration among all media outlets that substantially contribute to the dissemination of diverse and antagonistic viewpoints in local markets.[892] These rules make a rule directed only at radio and television unnecessary and anachronistic.

d. Conclusion

390. We do not have evidence in the record sufficient to support retention of the current radio/television cross-ownership rule. From a competitive perspective, radio and television are not good substitutes for the same revenue producing opportunities, and thus, cannot be regarded as

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[892] MOWG Study No. 8 shows that consumers use a wide variety of media to obtain entertainment, news and information, and that the general public views all of these sources as substitutes. MOWG Study No. 3 shows consumers' increased use of the Internet at work and at home. Internet use has increased from 15% in 1997 to 46% in 2000. *Id.* at Table 7. The UCLA Internet Report suggests that over the past three years a significant number of Internet users have been substituting away from television, getting more news and entertainment online. "The UCLA Internet Report: Surveying the Digital Future, Year Three," UCLA Center for Communication Policy (Feb. 2003) at 33. *See also* CanWest Comments at 6; CST Comments at 5-7; Paxson Comments at 34-35. No commenters argue that a diversity analysis should be limited strictly to radio and television programming.

competing in the same product market. There is little evidence that the current rule promotes localism and, to the contrary, the record indicates that combined station groups may be able to achieve cost savings that may accrue to the benefit of listeners and viewers. Finally, radio and television stations compete with many other electronic and print media in providing programming and information to the public, and the targeted cross-media limits adopted herein are therefore better designed to achieve our diversity goal in markets where diversity could be jeopardized by cross-ownership than the stand-alone radio/television cross-ownership rule. In addition, our local television and local radio ownership rules, which are designed to preserve competition in those markets, will also foster diversity of voices. We turn next to a discussion of the Diversity Index, which is intended to help us analyze outlets that contribute to viewpoint diversity in local markets.

3. The Diversity Index[893]

391. In order to provide our media ownership framework with an empirical footing, we have developed a method for analyzing and measuring the availability of outlets that contribute to viewpoint diversity in local media markets. The measure we are using, the Diversity Index or DI, accounts for certain, but not all media outlets (newspapers, broadcast, television, radio, and the Internet) in local markets available to consumers, the relative importance of these media as a source of local news, and ownership concentration across these media. The DI builds on our previous approach to the diversity goal: We retain the principle that structural regulation is an appropriate and effective alternative to direct content regulation; we retain the principle that viewpoint diversity is fostered when there are multiple independently-owned media outlets in a market; we retain our emphasis on the

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[893] The Commission wishes to recognize some of its economists for their efforts in developing this index including: Thomas Spavins, Enforcement Bureau, Judith Herman, Media Bureau, and John Scott, Media Bureau.

citizen/viewer/listener and on ensuring that viewpoint proponents have opportunities to reach the citizen/viewer/listener. What we add is a method, based on citizen/viewer/listener behavior, of characterizing the structure of the "market" for viewpoint diversity. We use the DI as a tool to inform our judgments about the need for ownership limits. This section explains the rationale for the diversity index and discusses calculation methodology. The DI is based partly on the results of a consumer survey, which we acknowledge is not without flaws, and partly on our expert judgment and analysis of the local viewpoint diversity marketplace. While the Diversity Index is not perfect, nor absolutely precise, it is certainly a useful tool to inform our judgment and decision-making. It provides us with guidance, informing us about the marketplace and giving us a sense of relative weights of different media. It informs, but does not replace, our judgment in establishing rules of general applicability that determine where we should draw lines between diverse and concentrated markets.

392. Because of the limitations in the Nielsen survey, and the specific assumptions underlying the DI, it is a useful tool only in the aggregate. It cannot, and will not, be applied by the Commission to measure diversity in specific markets. Indeed, it could not be used on a particularized basis to review the diversity available in a specific market. For example, in determining the appropriate weights to apply to the various media, we have decided to give no weight to cable television or magazines as sources of local news, notwithstanding the results in the Nielsen survey to the contrary.[894] We recognize that consumers in certain markets do have access to local news from local magazines, local cable news channels, and PEG channels, but we believe that the Nielsen survey overstates this influence. On a national basis, we believe most consumers either do not

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[894] *See* our discussion excluding magazines and cable television in subsection, Choice of Media, Section VI(C)(3)(b), *infra*.

have access to such sources (such as a local news magazine) or rely very little on them (such as PEG channels). Similarly, the DI assumes each town has only one weekly newspaper. In the aggregate, the DI reflects the market situation of most communities. In sum, excluding these sources or factors from the DI does not undermine the general conclusions we reach about market concentration because the DI is not capable of capturing particularized market characteristics; it is intended to capture generalized, typical market structures and identify trends.

a. Rationale for the Diversity Index

393. As discussed above, fostering diversity is one of the principal goals of the Commission's media broadcast ownership rules. In the past, the Commission has described its diversity goal as fostering "competition in the marketplace of ideas." Although the analogy between economic competition and diversity is not perfect, it is of use in structuring our approach. Viewpoint diversity refers to availability of a wide range of information and political perspectives on important issues. Information and political viewpoints are crucial inputs that help citizens discharge the obligations of citizenship in a democracy. We recognize that the number of political viewpoints or the number of perspectives on a particular issue may be greater than the number of media outlets in a market. And we recognize that, in n effort to cater to viewer/listener/reader preferences any single outlet may choose to present multiple viewpoints on an issue. However, we do not expect every outlet to present every perspective on every issue. The competition analogy suggests that having multiple independent decision-makers (i.e., owners of media outlets) ensures that a wide range of viewpoints will be made available in the marketplace.

394. News and public affairs programming is the clearest example of programming that can provide viewpoint diversity. As discussed above, we regard viewpoint diversity to be at the

core of our public interest responsibility, and recognize that it is a product that can be delivered by multiple media. Hence, in contrast to our competition-based rules, diversity issues require cross-media analysis.[895] Because what ultimately matters here is the range of choices available to the public, we believe that the appropriate geographic market for viewpoint diversity is local, *i.e.*, people generally have access to only media available in their home market.[896] To assist in our analysis of existing media diversity, and to help us determine whether any cross-media restrictions are necessary in the public interest, we use a summary index that reflects the general or overall structure of the market for diverse viewpoints. By analogy with competition analysis, the diversity index is inspired by the Herfindahl-Hirschmann Index (HHI) formulation, calculating the sum of squared market shares of relevant providers in each local market.

395. The measurement of market concentration has a long history in economics and several different measures have been proposed in the economics literature.[897] For example, a simple count of the number of firms in an industry (as the Commission has previously done in the media industry), the four-firm concentration ratio (measuring the percentage of the market held by the top four companies), and the HHI have all been ascendant at various times. The HHI measure, however, is particularly attractive for two reasons.

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[895] See the discussion of the local radio and local television rules, Section VI(A) and (B), wherein we conclude that radio and television advertising markets are separate and that consumers of programming do not see radio and television as close substitutes.

[896] *See 1984 Multiple Ownership Report and Order*, 100 F.C.C.2d at 24-25 ¶ 24; *Notice*, 17 FCC Rcd at 18546 ¶ 136.

[897] For an overview of this literature *see, e.g.*, Jean Tirole, THEORY OF INDUSTRIAL ORG. (MIT Press 1993) at 221-23; Michael Waterson, ECONOMIC THEORY OF THE INDUSTRY (Cambridge Univ. Press 1984) at 166-74.

396. First, its mathematical properties correspond to our beliefs about the effects a merger would cause. Each possible measure of market concentration has benefits and weakness that can be captured by the list of mathematical properties, or axioms, that that particular measure satisfies.[898] In the case of measuring market concentration, a list of reasonable requirements or axioms limit us to the choice of few mathematical formulas.[899] Within this class of admissible indices, the HHI can be thought of as a very conservative choice in the following sense. If we ask "what is the loss of competition from a merger," known as the "delta" in the antitrust field, the HHI measure reflects the assumptions that: (i) an acquisition of a firm with given size will lead to a larger harm the larger the acquiring firm, and (ii) this harm is proportional to the size of both the merging parties. Applying a similar analysis to the Diversity Index, the Index reflects the assumptions that if newspapers have twice the diversity importance of television, a newspaper's acquisition of a broadcast television station will cause twice the loss of diversity as will a merger of two broadcast television stations. Conversely, if radio has less diversity weight than television, then a merger of a television and a radio station will cause less of a loss of diversity than will a merger of two television stations. In contrast, if the Commission were to adopt a simple "voice test," for example, then it would be assuming that the loss of voice due to a merger is independent of the diversity

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[898] A requirement placed on an index is known in mathematics as an axiom. When we can show that there is a unique mathematical function that satisfies a given list of axioms, then that function is said to be *characterized* by the list of axioms. For a classic exposition of the axiomatic approach *see* J. Aczel, LECTURES ON FUNCTIONAL EQUATIONS AND THEIR APPLICATIONS (Academic Press 1966).

[899] The axioms are presented in David Encaoua and Alexis Jacquemin , *Degree of Monopoly, Indices of Concentration and the Threat of Entry*, 21 INT'L ECON. REV. 87-105 (1980). Their list includes axioms such as, the value of an index should increase when two firms merge and decrease when a new firm enters.

importance of either party. Similarly, if the Commission were to adopt a concentration ratio measure, then it would implicitly be assuming that the loss of diversity is independent of the size of the larger firm in the transaction. It is in this sense -- that the size of the diversity loss increases as does the diversity importance of either merging party – that the Diversity Index developed here is a conservative measure, and one which we adopt in the interest of prudence.

397. Moreover, the HHI, from which our chosen measure derives, is widely used in economics and in antitrust. Thus, we can draw on our experience with the HHI in competition policy to determine threshold values for the Diversity Index. Indeed, the HHI formula is already widely used in the diversity literature for measuring content diversity.[900]

398. We assign market shares to these providers based in part on the results of responses to the Nielsen survey described in MOWG Study No. 8. The Diversity Index itself, however, is a blunt tool capable only of capturing and measuring large effects or trends in typical markets. Thus, the DI change from a particular transaction in a particular market might be more or less than we anticipate, or that it might result in a market DI higher or lower than that suggested by our examples. This is of no moment as the DI is a tool useful only in the aggregate and will not – and cannot in its current form - be applied on a particularized basis.

399. There are several conservative assumptions in our analysis of viewpoint concentration. First, we premise our analysis on people's actual usage patterns across media today. Fox reasonably argues that the Commission should set ownership limits based on the availability of news sources

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[900] The literature using the HHI to measure content diversity goes back to at least 1979. *See* Barry Litman, *The Television Networks, Competition and Program Diversity*, 23 J. OF B'CASTING 393-409 (1979).

irrespective of their particular usage rates by consumers.[901] The record contains evidence that most people can and do substitute among different media for news and information.[902] Nonetheless, our method for measuring viewpoint diversity weights outlets based on the way people actually use them rather than what is actually available as a local news source. We adopt this approach out of an abundance of caution because we are protecting our core policy objective of viewpoint diversity. Second, our diversity analysis is based on preserving viewpoint diversity among local, not national, news sources. The effect is that we exclude, for purposes of measuring viewpoint concentration, the large number of national news sources such as all-news cable channels and news sources on the Internet and instead focus exclusively on the smaller set of outlets that people rely on for local news. Excluding those national sources thus leaves us with a smaller set of 'market participants' that we regulate to protect local news diversity in a way that might be unnecessary to protect diversity among national news sources. Third, we do not include low power television and low power radio stations in measuring viewpoint diversity. These stations are often operated with the express purpose of serving niche audiences with ethnic or political content that larger media outlets do not address. These low power outlets promote viewpoint diversity in a way that we have not addressed because of their more limited reach, but collectively they enhance viewpoint diversity beyond the levels that are reflected in our Diversity Index measurements.

400. We conclude that each of these judgments that inform our viewpoint diversity analysis are sound, but in each case we make the most conservative assumption possible. Thus, the results of our diversity index analysis can fairly be said to understate the true level of viewpoint diversity in any given market.

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[901] Fox Comments at 59.

[902] MOWG Study No. 3 at 80.

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

MEDIA GENERAL, INC.

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

APPENDIX VOLUME III

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CONTENTS

Document **Page**

VOLUME I

United States Court of Appeals for the Third Circuit

Majority Opinion (June 24, 2004) 1a
Dissenting Opinion 107a

Order Denying Petition for Rehearing
(Sept. 3, 2004) 191a

Order Granting Stay (Sept. 3, 2003) 194a

Order Denying Transfer (Sept. 15, 2003) 197a

VOLUME II

Federal Communications Commission

Report and Order 206a

VOLUME III

Report and Order (continued) 486a
Notice of Proposed Rulemaking 652a

Statement of Chairman Powell 663a

Statement of Commissioner Abernathy 666a

Statement of Commissioner Martin 673a

Dissenting Statement of Commissioner Copps 677a

Dissenting Statement of Commissioner Adelstein 714a

b. Choice of Media

401. We have determined which media to include in the Diversity Index based on the survey information derived from the "Consumer Survey on Media Usage" prepared by Nielsen Media Research (FCC MOWG Study No. 8). This survey tells us how consumers perceive the various media as sources of news and information. The key threshold implication of this study is that consumers use multiple media as sources of news and current affairs, and hence that different media can be substitutes in providing viewpoint diversity. For example, consider a citizen who acquires local news from television, newspapers, and radio. Suppose that a group of citizens in the consumer's home town wishes to oppose a bond issue for a new sports stadium, and that the local newspaper and television stations favor the bond issue and choose not to cover the position of opponents. If the opponents nevertheless get radio coverage for their position, they would be able to reach this particular citizen. Indeed, one might think that part of the radio coverage might address the fact that other media are "ignoring" the story. This could then raise the profile of the story to a level that might attract newspaper or television coverage. We put forward this hypothetical sequence of events not because we think that it describes a process that will happen with respect to any particular controversy. Rather it is a useful illustration of the process by which markets with multiple independent media outlet owners operate, particularly in an environment in which citizens generally do not depend on a single medium for their local news and current affairs.

402. FCC MOWG Study No. 8 asked respondents to identify the sources, if any, "used in the past 7 days for local news and current affairs." The same question was posed for national news and current affairs. The choices offered were television, newspaper, radio, Internet, magazines, friends/family, other, none, don't know, and refuse. The survey then asked follow-up questions regarding the first five choices. For each one of the five sources, respondents who did not mention a source were

asked specifically if they used that source for local news and current affairs. The survey posed analogous questions with regard to national news and current affairs. Based on the initial and follow-up questions, the survey presents "summary data" on sources of local and of national news and current affairs information.

403. In an *ex parte* communication filed May 28, 2003, Media General submitted a critique of MOWG Study No. 8 by Prof. Jerry A. Hausman. Hausman argues that the Nielsen Survey has a number of serious flaws and questions its usefulness in any rule-making concerning cross-ownership of newspapers and broadcast stations.[903] First, he claims that the low response rate of the survey may lead to biased results.[904] Second, he argues that survey questions about hypothetical future circumstances are unreliable. He cites a number of cases where respondents, presented with relatively simple questions, are unlikely to consider the full, complete implications if a particular form of media were to become unavailable.[905] Third, he argues that the survey asks no questions that address the newspaper/broadcast cross-ownership issues.[906]

404. We recognize Professor Hausman's concerns, but we believe that the Nielsen survey sample of 3,136 households provides us with useful information. In addition, Professor

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[903] Statement by Jerry Hausman, Media General Notification of Ex Parte Communication (May 28, 2003)

[904] *See* Hausman at 3.

[905] For example, he cites where the Nielsen survey asks whether respondents would be more likely to use cable or satellite news channels for news if broadcast TV channels were not available. He notes that the question does not ask the respondent to consider a number of important factors, such as whether VHF and UHF news programs would cease to exist or whether only cable and satellite news programs would remain. Since it is not clear what hypothetical world the respondents are assuming. Hausman argues, the results of the survey are not reliable. Hausman, at 4-5.

[906] Hausman at 6.

Hausman provides no evidence that the sample is, in fact, biased. Concerning Hausman's second point, we agree that answers to hypothetical questions are less useful than information about actual behavior. MOWG Study No. 8 provides a substantial amount of information on reported actual behavior. It is this information, not the hypotheticals, on which we rely to conclude that media can be substitutes in providing viewpoint diversity and to construct our Diversity Index. Regarding Hausman's third point, although the Nielsen survey may not directly ask respondents for their views concerning specific cross-ownership scenarios, we find that the results of the survey are useful in a number of areas, such as which forms of media are most heavily used for news. While questions could have been posed that contained more specificity concerning cross-ownership rules, we understand that such complexities could have made the survey design more difficult, as well as possibly lowered the response rate. Overall, while Hausman claims that the Nielsen survey does not "provide a basis for the measurements necessary for the specification of policy,"[907] the survey does, in fact, help us establish an "exchange rate" for converting newspaper, television, radio, and other media into common units so we can measure the extent of concentration in the "market of ideas." Finally, we emphasize that the Commission has not relied solely on the results of the Nielsen survey, but has used a number of studies and its own expert judgment on media in reaching its decision.

405. The data in the Nielsen study indicate that television, newspapers, radio, Internet, and magazines are the leading sources of news and current affairs programming.[908] Indeed, the summary data tables list only those five sources. In the initial questions, less than one percent of respondents cite "other" as a source. Based on the initial question, the average respondent uses two of the five major sources for news and current affairs,

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[907] Hausman at 3.

[908] MOWG Study No. 8 at Tables 97 and 98.

whether the category is local or national. Taking account of the follow-up questions, the average respondent uses three of the five major sources for news and current affairs, again regardless of whether the category is national or local.[909] These data strongly suggest that citizens do use multiple media as sources of viewpoint diversity, and that media can be viable substitutes for one another for the dissemination of news, information and viewpoint expression. On the basis of this finding, we proceed to an analysis of local media markets and whether there are particular kinds of cross-media transactions in particular kinds of markets that would likely result in high levels of concentration. To assist in making that determination, we rely in part on our Diversity Index.

406. Our Diversity Index focuses on availability of sources of local news and current affairs. As we explained in our policy goals section above, we are concerned with promoting viewpoint diversity in local media markets. Owners of media outlets clearly have the ability to affect public discourse. Consumers have numerous sources of national news and information available to them. Three major commercial broadcast networks, ABC, NBC, and CBS, provide this material and are available to 98% of US television households.[910] Several nonbroadcast networks also provide national news and current affairs information also are widely available. Subscribership to CNN is 77.4% of US television households.[911] The comparable figures for Headline News, Fox News, MSNBC, and CNBC are 74.1%, 71.8%, 68.4%, and

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[909] The average respondent uses 2.93 different media for local and 2.71 different media for national news and current affairs.

[910] *See* OPP Working Paper 37 at 48. In January 2002, there were 105.5 million television households in the U.S. *See* Television Advertising Bureau, *Trends in Television* at *www.tvb.org*.

[911] *See* Kagan World Media, *Cable Television Investor* (July 29, 2002) at 14.

74.9%, respectively.[912] Local newspapers generally provide information on national issues, and a variety of major newspapers have national footprints. They include USA Today, the Wall Street Journal, the New York Times, and others. Moreover, a wide range of newspapers are available on-line at no charge. National news magazines, such as Time, Newsweek, US News and World Report, and more specialized political journals, such as Weekly Standard and New Republic are also widely available.[913] Therefore we do not believe that governmental regulation is needed to preserve access to multiple sources of national news and public affairs information.

407. The Diversity Index incorporates information on respondents' usage of television, newspapers, radio, and the Internet. Respondents also reported getting local news and information from magazines.[914] We exclude magazines, however, from our Diversity Index. First, as the description above makes clear, most (but not all) news magazines have a national rather than a local focus. Although there are exceptions (e.g., the Washingtonian and Texas Monthly), the figures in MOWG Study No. 8 on magazines use appear to be overstated. This simplification and assumption is supported by other aspects of the study. For example, unlike newspapers, radio, and television, almost no one cited magazines as their primary source of news and current affairs. MOWG Study No. 8 includes a question asking respondents to identify their single primary source of local or national news and current affairs.

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[912] *Id.* The total television households figure (105.5 million) is for January 2002 and is from Television Advertising Bureau, *Trends in Television* at www.tvb.org.

[913] *See* Appendix B for a summary list of major national news sources. We note that some of the sources for national news and information are owned by the same companies but we continue to believe that consumers have numerous independently owned sources of national news and information.

[914] Six percent of respondents answered that they received their local news and information from magazines.

The figure for magazines is 0.6%.[915] A 2000 study by the Pew Research Center for the People and the Press provides similar results.[916] The study examines "Trends in Regular News Consumption" and finds that 12% of respondents, but only 4.2% of responses cite news magazines. An even lower share, 5% of respondents and 1.7% of responses, cite business magazines. Moreover, these figures include consumption of national as well as local news. The share of the sample utilizing magazines for local news is smaller, perhaps considerably so. The Pew Center data support our inference that magazines play a negligible role overall as a source of local news. We must also note that, although the actual local news figure is small, because both the MOWG Study No. 8 and Pew Center figures combine local and national news, the precise magnitude of the local news figure is uncertain. Hence we are unable to assign to magazines a weight (even a small weight) in which we would have confidence. Nonetheless, the decision to exclude magazines will be re-examined in the next biennial review, and we will take the opportunity to gather additional survey data at that time on magazine usage.

408. For similar reasons, we also exclude cable from our Diversity Index. As discussed in the following section, we are concerned that some consumers may have confused broadcast and cable television. Thus, we believe some consumers who replied that they receive their local news from cable may have been viewing broadcast channels over the cable platform. We also recognize, however, that cable systems do provide local news and current affairs information through PEG channels and, in some markets, local news channels. However, we do not have accurate data for this measure. Because we do not

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[915] MOWG Study No. 8, Table 20.

[916] Pew Research Center for the People and the Press, *Internet Sapping Broadcast News Audience*, http://people-press.org/reports/display.php3?PageID=203.

have reliable data on this point, we exclude cable from the DI to simplify our general analysis.[917]

c. Weighting Different Media

409. We have concluded that various media are substitutes in providing viewpoint diversity, but we have no reason to believe that all media are of equal importance. Indeed the responses to the survey make it clear that some media are more important than others, suggesting a need to assign relative weights to the various media. In view of our focus on local news and current affairs, we choose to base our weights on survey responses to the question asking respondents to identify the sources, if any, "used in the past 7 days for local news and current affairs."[918] We recognize that this is not a perfect measure, and that it requires some adjustment. We justify these adjustments and assumptions, however, by emphasizing that we are using the DI only to inform us of general market trends, not for precise measurements.

410. As noted above, the average respondent uses three different media for local news and current affairs information. It is likely that, for a given respondent, the three are not all of equal importance. If media differ in importance systematically across respondents (*e.g.*, if television were most important to everyone, and everyone made only minor use of radio to acquire news and current affairs information), then it would be misleading to weight all responses equally.

411. Unfortunately, we do not have data on this question specifically with regard to local news and current affairs. The available "primary source" data address local and national news together and do show that different media have different importance, in the sense that primary usage differs across

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[917] As with magazines, we will review this issue in the next biennial review, and may collect at that time more accurate survey data on consumers' use of cable for local news and current affairs.

[918] MOWG Study No. 8, Table 97.

media.[919] Because "primary source" data are not available for local news and current affairs alone, we use the data identifying sources of local news and public affairs programming to weight the various media to reflect relative usage. As noted below, this leads to lower shares for television and higher shares for radio than the "primary source" shares reflect.

412. The local response summary data, Table 97 of MOWG Study No. 8, include five categories of media—Internet, magazines, radio, newspaper, television. Magazines account for 6.8% of responses to the questions on source of local news and current affairs. We exclude magazines as explained above and normalize the shares of the four remaining media to sum to 100%. The resulting weights are television (33.8%), newspapers (28.8%), radio (24.9%), and Internet (12.5%).[920] The local response summary data do not break down the television responses between broadcast television and cable/satellite television. Nor do these data separate out usage of daily and weekly newspapers. We make use of other FCC MOWG Study No. 8 questions to apportion the newspaper shares further.

413. Although the responses to one question in MOWG Study No. 8 suggests that cable is a significant source of local news and current affairs, other data from the study casts some doubt on this result. The following discussion explains the reasoning that leads us to exclude cable/satellite television from the current analysis of local news and current affairs for diversity purposes. As a threshold matter, DBS currently provides little or no local nonbroadcast content. We do, however, recognize that cable provides some such content and that it is becoming a more important source of local news and information. Some markets do have commercial local news

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[919] *Id.*, Table 20.

[920] The "primary use" weights, excluding magazines, are television (57.8%), newspapers (25.8%), radio (10.3%), and Internet (6.1%). When magazines are included their weight is 0.6%. *Id.*

channels on cable.[921] Moreover, at least one national cable news service (CNN Headline News) provides a five-minute local "cut-in" every half hour in some markets. Additionally, local public, educational, and governmental ("PEG") channels provide some local news and information, although the extent of their impact is unclear. MOWG Study No. 8 asked respondents who get local news and current affairs from television (table 8) to indicate if the source is "broadcast television channels," cable or satellite news channels," "some other channel," "don't know," or "refuse." Virtually all responses fell into the first two categories, with 46.4% of respondents who get local news from television identifying cable as their source.[922]

414. Our experience suggests that the local cable news response is too high. A review of the responses reported in tables 6, 16, and 18 of MOWG Study No. 8 support this assumption. Table 18 provides responses from all who get news (local or national) from cable to the question "what are the names of the news channels you watched in the past 7 days on cable or satellite for local or national news or current affairs?" The list from which respondents can choose includes CNN, Fox News Channel, MSNBC, Local Cable News Channels, Headline News, CNBC, Other, Don't Know, and Refuse. The last two choices get minimal response, but 27.5% of responses are "Other." This suggests that some people may be counting retransmitted broadcast signals on cable or satellite as cable or satellite channels.[923] Moreover, joint examination

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[921] Roughly one-third of cable subscribers, 22.3 million, had access to a local or regional news channel in July 2002. *See* OPP Working Paper 37 at 126.

[922] The corresponding figure for national news (from table 16) is 51.1 percent.

[923] Because all cable systems carry local broadcast stations pursuant to our signal carriage rules, and because DBS carriers provide local broadcast signals in many markets, also pursuant to our signal carriage rules, it is

of the responses reported in tables 6, 16, and 18 make it possible to infer that 94.3% of those who get news from cable (the table 18 universe) claim to get at least some local news from cable. However, only 6.1% of responses mention local cable news channels.[924] This disparity makes us question the responses regarding local news via cable and satellite channels and supports our conclusion that weighting cable 46.4% is too high. An additional reason that leads us to question cable as a local news source is that, of those local cable channels that meet Nielsen's minimum reporting standards, they are the least watched of any broadcast or cable stations in the market.[925] Given the low viewing of PEG channels and the facts that only one-third of cable subscribers have access to a local cable news channel and we do not have an accurate cable figure to use, we believe excluding cable from the Diversity Index on a national basis is a reasonable assumption. We will review the status of cable as a local news provider in the 2004 biennial review. Our review will include a follow-up to MOWG Study No. 8, which will include more detailed questions regarding the use of nonbroadcast video media for local news and current affairs.

415. With regard to newspapers, MOWG Study No. 8 indicates that 61.5% of those who cite newspapers as a source of local news and current affairs acquire that information from

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possible, even likely, that the "other" category actually reflects viewing of retransmitted broadcast signals. If we assume that viewers are likely to be familiar with local broadcast signals, it is not likely that the "don't know" category includes broadcast signal viewing.

[924] Local cable news channels are, unlike the Internet, not available everywhere, but only in select markets. Only approximately one-third of cable subscribers have access to such channels. *See* OPP Working Paper 37 at 126. The ownership limits apply nationwide, and the diversity index is intended to help us define these ownership limits. This was an additional reason for excluding cable from the DI while counting the Internet.

[925] Nielsen Television Index (Nov. 2000).

dailies only, 10.2% from local weeklies only, and 27.3% from both.[926] This works out to a share of 70.3% daily and 29.7% weeklies. We use these weights to divide the total newspaper share (28.8%) among daily and weekly newspapers. Our next biennial review will provide an opportunity for re-examination of the role of weekly newspapers. Accounting for the additional information on newspapers results in a revised set of weights. They are: broadcast television 33.8%, daily newspapers 20.2%, weekly newspapers 8.6%, radio 24.9%, and Internet 12.5%.

416. Various commenters agree that MOWG Study No. 8 supports the conclusion that citizens do, in fact, see different media as alternative sources of news. For example, NAA opines that the study, "a comprehensive survey…shows that the public makes ample use of a broad assortment of outlets" and that it "demonstrates that the public relies heavily on a range of alternative media."[927] Fox opines that the study "demonstrates that consumers are utilizing the wide variety of media available to them to obtain both local and national news and information." Later, this commenter states that this study, along with another study discussed in the comments "demonstrates that consumers are adept both at using various sources to obtain information and at using multiple sources simultaneously."[928] Critics of MOWG Study No. 8 include AFL-CIO and AFTRA, both of whom rely on a paper by Baker, attached to the AFL-CIO comments.[929] The Baker submission refers to the fact that MOWG Study No. 8 reports responses to a number of hypothetical questions regarding how respondents would behave if the availability to them of certain media were to change. Baker observes that the study "looks at what people

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[926] MOWG Study No. 8, Table 7.

[927] NAA Comments at 8.

[928] Fox Comments at 11, 25.

[929] *See* AFL-CIO Comments at 12 and Baker Study at 12-14 ; AFTRA Comments at 8.

say they will do" and goes on to assert that "[E]conomists usually prefer looking at what people do."[930] We agree that answers to hypothetical questions are less useful than information about actual behavior. MOWG Study No. 8 provides a substantial amount of information on reported actual behavior. It is this information, not the hypotheticals, on which we rely to conclude that media can be substitutes in providing viewpoint diversity and to construct our Diversity Index. It is worth noting in this connection that much of the information we have on radio listening and television viewing is also based on reports by listeners and viewers of their behavior. Moreover, the information in MOWG Study No. 8 on the range of media that citizens use for news and information is quite similar to the results of a recent independent survey by the Pew Research Center.[931]

417. The most detailed analysis of MOWG Study No. 8 comes from the Consumer Federation of America.[932] CFA agrees that citizens get viewpoint diversity from multiple media. Their comments refer to the "two dominant political media—daily newspapers and television," although CFA asserts that these media "appear to play very different roles." As noted above, television has the largest weight in the DI (33.8%) and daily newspapers also loom large at 20.2%. Although the radio weight is somewhat higher at 24.9%, the fact that markets generally have far more radio stations than daily newspapers make our weights consistent with CFA's conclusion that newspapers are among the two most influential media. CFA finds that the Internet plays a small but growing role in citizen acquisition of news and information, a finding not inconsistent with the relatively low weight of Internet in our

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[930] Baker Study at 14.

[931] Pew Research Center for the People and the Press, *Sources for Campaign News, Fewer Turn to Broadcast TV and Papers*, (Apr. 27, 2003) at http://people-press.org/reports/display.php3?PageID=243.

[932] *See generally* CFA Comments at 94-147.

DI. CFA quotes statistics on daily use of television, newspapers, radio, and Internet that yield usage shares not too different from our DI weights. Drawing on two surveys, CFA suggests that people spend 4 minutes per day on average gathering news from the Internet, 25 minutes reading newspapers, 15 minutes listening to radio news, and "over half an hour" watching television news.[933] Ascribing half an hour to television leads to shares of 40.5% for television, 33.8% for newspapers, 20.3% for radio, and 5.4% for Internet. These are fairly close to our DI weights of 33.8%, 28.8%, 24.9%, and 12.5% for television, newspapers, radio, and Internet, respectively.

418. Although CFA does not dispute the proposition that different media address the same issues and stories, it asserts that they do so in different ways, suggesting, *inter alia*, that television is "the primary source for breaking news," that newspapers have a larger role in "the follow-up function," and that talk shows are a new and significant element of radio's role in disseminating viewpoints.[934] Although CFA does not discuss the role of radio as a source of breaking news, we acknowledge that different media do present information in different ways. CFA also argues that, particularly for "high use respondents" (the one-third of respondents in MOWG Study No. 8 whose total media use was above the sample average) there is evidence that the media are complements rather than substitutes, *i.e.*, people who use more of one medium tend to use more of the others. For the "low use respondents" (the one-half of respondents whose total media use was below the sample median), in many cases there are negative correlations in usage across many pairs of media. CFA suggests that this is consistent with substitution.[935] Thus, CFA appears to conclude

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[933] *Id.* at 109.

[934] *Id.* at 112, 100.

[935] *Id.* at 142-145.

that media are substitutes for some citizens and complements for others.

419. We disagree with CFA's conclusion that the DI is invalid because some citizens may consider certain media outlets complements rather than substitutes. In the technical economic sense, two goods are substitutes if an increase in the price of good A (which leads to a decrease in consumption of good A) leads to an increase in the consumption of good B. In the context of our diversity goal, we are concerned with the question of what happens when one or more media outlets refuses to transmit a particular viewpoint. If most citizens accessed only one type of outlet, *e.g.*, radio but not newspapers or television, then our diversity goal would prompt us to analyze separately the structure of the "radio marketplace of ideas." If, on the other hand, most citizens access multiple media, then we can rely on the reasonable probability that, if, *e.g.*, the local newspaper refused to cover a particular story, citizens would be exposed to that story via independently-owned other media, such as radio or television. In other words, evidence that media are complements in the sense that, for at least some citizens, there is a positive correlation between use of one medium and use of another, does not invalidate the premise underlying the DI.

d. Weighting Outlets Within the Same Medium

420. Having decided on relative weights for the various media, we next confront whether and how to weight different media outlets within each category. The decision of whether to do weighting turns on whether our focus is on the availability of outlets as a measure of potential voices or whether it is on usage (*i.e.*, which outlets are currently being used by consumers for news and information). We have chosen the availability measure, which is implemented by counting the number of independent outlets available for a particular medium and assuming that all outlets within a medium have equal shares. In the context of evaluating viewpoint diversity, this approach

reflects a measure of the likelihood that some particular viewpoint might be censored or foreclosed, *i.e.*, blocked from transmission to the public.

421. The underlying assumption here is that all outlets have at least similar technical coverage characteristics. This is a good, but not perfectly accurate assumption. Our signal carriage rules more or less equalize the coverage of all television stations in a particular DMA,[936] and it appears that newspapers (even those with limited current circulation) can expand their circulation area at relatively low cost. That is, assuming that additional readers are interested in the content, additional delivery personnel and vending machines are readily available at low cost. However, the assumption is less certain for radio. For example, a Class C FM station and a daytime AM station, in fact, have different coverage characteristics. The Class A station cannot expand its coverage to match that of the Class C FM station and thus reach additional listeners who might otherwise not have access to the views expressed on this outlet. Nevertheless, we believe the assumption to be reasonable across all cases. Arbitron radio metros are smaller than many radio station service areas and so would have the effect of truncating the service areas of more powerful stations. In addition, even though radio's total diversity share is 24.9%, on average there are enough radio stations so that the per-station share is fairly small. Any distortion in share by overestimating the reach of small radio stations is therefore small.

422. Even though we choose to assign the same weight to each outlet of a particular medium, we reiterate the importance of assigning different weights to different media. As noted above in ¶ 409 *et seq.*, different media are of different

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[936] We make this assumption for the purposes of constructing the DI; the actual differences in coverage are accounted for in the rules themselves, e.g., the UHF discount in the national rule, and our waiver policy in the local TV and CML rules will look to the actual reach of stations.

importance. The differences in usage across media documented in MOWG Study No. 8 are in part reflections of the differential impact on the user of television, radio, newspapers, etc. We believe that the overall impact of a medium is substantially determined by the physical attributes of its distribution technology, along with user preferences. A radio station owner is able to change format, say from classic rock to all-news, and thus change its impact on the marketplace of ideas. But a radio station switching to all-news does not thereby turn itself into the equivalent of a television station nor does its impact on the marketplace of ideas become that of a television station. Conversely, if a home shopping television station began to carry substantial local news programming, the impact on the marketplace of ideas would be greater than that of the former classic rock radio station.

423. The case for a usage measure is that it reflects actual behavior. However, current behavior is not necessarily an accurate predictor of future behavior. Moreover, in order to implement a usage measure accurately, it would be necessary for us to define which content should be considered local news and current affairs. Current behavior, *e.g.*, viewing or listening to a broadcast station, is based on the content provided by the station in question. However, media outlets can change the amount of news and current affairs that they offer, perhaps in response to competitive conditions in the "viewpoint diversity" marketplace. Such changes are unpredictable, so current market shares (e.g., of viewing or listening) may not be good predictors of future behavior. Indeed, advocates of a concentration approach to diversity analysis have noted the weakness of the usage approach, pointing out that "[E]vidence of past production does not, as a matter of logic, necessarily give a proper picture of a company's future ability to compete.' Only in examining 'its structure, history and probably future, does one provide' the appropriate setting for judging the

probably anticompetitive effect of the merger'"[937] This point has particular force when dealing with competition in the marketplace of ideas because media outlets can rapidly expand their distribution of content (including local news and current affairs) at very low marginal cost. Of course, availability of media can also change. However, this is less likely to occur than is change in the program schedule or station format. Moreover, availability is far more likely to increase than decrease. Although a broadcast station owner could turn in the station license and take it out of service, this happens rarely if ever. A more likely scenario is an increase in media availability as a new station enters the market.

424. If we were to adopt a usage measure designed to reflect our concern with local news and current affairs, we would need information on viewing/listening/reading of local news and current affairs material. To implement this procedure, it would be necessary first to determine which programming constituted news and current affairs. We believe that this type of content analysis would present both legal/Constitutional and data collection problems. News and current affairs content is not necessarily limited to regularly-scheduled news programs. So we could be faced with deciding which other programs were news and current affairs, whether some portion of a program not primarily news should count as news, and, indeed, whether portions of a news report devoted, e.g., to movie reviews should count as news. Overall ratings or (in the case of newspapers) subscription data would not suffice. Someone who subscribes to a daily newspaper but only reads the (nationally-distributed) comics and the classified advertisements is undoubtedly getting a valuable service, but it is not clear that the service has anything to do with news and current affairs. Similarly, a television station that attracts large audiences by virtue of its

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[937] Maurice E. Stucke and Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L. J. 249, 277 (2001) (quoting *U. S. v. General Dynamics Corp.*, 415 U.S. 486, 501 (1974)).

movies and national sports programming provides an important service, but it would be misleading to judge the station's importance as a local news outlet by its overall ratings.

425. Ultimately, our goal is not to prescribe what content citizens access, but to ensure that a wide range of viewpoints have an opportunity to reach the public. This goal, the limitations of current usage as a predictor of future usage, and the content classification requirements for implementing a usage measure all lead us to adopt an "equal share" approach to weighting outlets within the same medium.

426. We deviate from this approach only in the case of the Internet. We use subscription shares to divide the Internet category among the two current significant sources of Internet access—telephone companies and cable companies. In order to determine the number of subscribers to telephone company based Internet access, it is necessary to add together "dial-up" and DSL subscribers. Dial-up service is available to anyone with a telephone line and offers a low-capacity connection (up to 56 kbps). DSL service offers much higher speed connections, but, due to the requirements of the technology and certain physical limitations of the telephone distribution network, it is not available everywhere. Cable companies offer high speed Internet access, and most cable plant has been upgraded to support this service. Some applications, such as viewing video clips of news and other content, are not fully supported by dial-up services. Trade and industry sources estimate that, as of the end of 2002, 85 million households had access to cable high speed Internet service and 11.3 million subscribed.[938] This leaves over 15 percent of households without access to cable modem service. Moreover, it is not clear how the areas in which cable modem service is unavailable compare to the areas in which DSL is unavailable. We therefore think it prudent to use subscriber figures to

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[938] *See Cable and Telecommunications Industry Overview 2002 Yearend*, at *http://www.ncta.com/industry_overview*.

calculate how to divide the Internet category between cable and telephone companies.

427. Table 78 of FCC MOWG Study No. 8 provides information on Internet access. Respondents who said they have home access to the Internet were asked a follow-up question regarding how they access the Internet. The answers (in percentages) were as follows: cable line 18.9 percent, DSL line 14.7 percent, telephone line 66.1 percent, other 3.5 percent, don't know 5.9 percent, and refuse 0.5 percent. The responses sum to 109.6 percent. If we take the 99.7 percent of respondents who picked cable, DSL, or telephone line as the base, and if we combine telephone and DSL, the resulting shares are 19 percent cable and 81 percent telephone. We recognize that, given the relatively small share of Internet in the total diversity market (12.5% weight), using subscriber shares rather than equal availability for Internet providers has a very small impact on our Diversity Index calculation.[939] In this regard, however, we reject the argument made by some commenters that we should not include the Internet at all. They argue that people only utilize the Internet to access their newspapers' and local broadcast stations' websites and,

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[939] As explained in the next section, "Calculation Methodology," our diversity index is calculated by squaring relevant market shares. If we were to assume that the two Internet sources had equal shares, the contribution to the index of Internet would be 78 points. The assumption we use as described in the text leads to a contribution to the index of 109 points. We do not attribute common ownership to Internet Service Providers, *e.g.*, even if Cox owns a television station and the local cable ISP in a market, we will not combine their market shares for the purposes of the Diversity Index calculation. We will assume (subject to examination at the next biennial review and to future findings we might make in our cable modem proceeding), that ISPs do not restrict subscriber access to Internet content based on the identity of the content provider. We also note that, as explained above, we are looking at the availability of news and information sources generally -- and websites particularly -- not their popularity.

therefore, the Internet does not add to diversity.[940] Although many local newspapers and broadcast stations maintain websites with news content, that does not begin to plumb the extent of news sources on the Internet. Some websites compile news from numerous sources, many of which an individual may not have know of or known how to access (*e.g.*, The Drudge Report). Others are unique to the Internet (*e.g.*, Salon). Moreover, we include the Internet because, as previously indicated, we are looking at availability of media, not the popularity of specific publications, stations, cable channels, or websites. There is a virtual universe of information sources on the Internet and there are websites not maintained by existing news media conveying information on everything from fringe political groups to local civic events. We cannot pretend that these are not in the "diversity" mix simply because only a small number of people may visit them.

e. Calculation Methodology

428. The Diversity Index is structured like an HHI, i.e., it is simply the sum of squared market shares. As explained above, squaring market shares, unlike measures based on the "raw" market shares, permits construction of an index that takes account of the market shares of all providers in the "market" for viewpoint diversity. As noted above, the geographic market we are using is local. We currently define television markets in terms of the Nielsen DMA. DMAs are exhaustive classifications, covering the entire United States, and it is straightforward to count the number of television stations in a DMA. We are including public as well as commercial stations. Public stations provide viewpoint diversity; indeed that is a specific part of their mandate. Although they do not have the

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[940] *See, e.g.*, AFL-CIO Comments at 12-14, (citing Consumer Union Comments in MM Docket No. 01-235, Douglas Gomery, *The FCC's Newspaper-Broadcast Cross-Ownership Rule: An Analysis* (Econ. Policy Inst., Feb. 2001)); AFTRA Comments at 10; UCC at al Comments at 23.

same programming incentives that commercial stations do, their partial reliance on viewer contributions means that they, like commercial stations, must be sensitive to the demands of their audience. We choose not to include television stations from outside the DMA in question, even if they obtain a measurable audience share in the DMA. Our focus is on local news and current affairs and it is not reasonable to assume that stations outside of the DMA in question will devote significant resources to news and current affairs programming targeted to that DMA. Our cable television signal carriage rules generally permit a television broadcast station within a DMA to obtain cable carriage throughout the DMA, and our DBS signal carriage rules generally ensure that all television stations within a DMA are treated the same with respect to satellite retransmission.[941] For this reason, we assume that all television broadcast stations in a DMA are available throughout the DMA. As explained above, each broadcast television station receives an equal share of the broadcast television weight.

429. We combine the television stations in each DMA with the radio stations in the Arbitron radio metro with which the DMA is paired. There are 287 Arbitron radio metros in the country. Each one is smaller than the DMA within which it lies.[942] Arbitron radio metros do not cover the entire country. More sparsely populated areas are not included in radio metros; approximately one-half of radio stations are not in a metro market. As explained below in the cross-media limits section of this *Order*, we use the Diversity Index to help us identify markets that are "at risk" for excessive concentration in the "viewpoint diversity market." Once those markets have been identified, and cross-media limits imposed, the actual implementation of the cross-media diversity limits will not require information on a local radio market, only on the

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[941] *See* 47 C.F.R. § 76.56 (Cable) and § 76.66 (DBS).

[942] Most radio metros lie wholly within a single DMA; virtually all of the others are predominantly within a single DMA.

television market (DMA) within which the radio stations are located that are part of a proposed merger. As detailed in the cross-media limits section, the analysis that we use to identify at-risk markets is based on examination of a substantial sample of the 287 Arbitron radio metro markets.

430. Daily newspaper publication and circulation data are not collected based on Arbitron radio metros. A different market concept, developed by the Department of Commerce, is used by the industry. The basic building block is the "Metropolitan Statistical Area," or "MSA." The Department of Commerce recognizes 318 metropolitan areas, which include 248 MSAs, 58 "PMSAs" (primary metropolitan statistical areas), and 12 "NECMAs ("New England county metropolitan statistical areas"). For Diversity Index calculation purposes, these areas are matched to Arbitron radio metros. Each daily newspaper that is locally published in the metropolitan area is included in the market. The daily newspaper share of the Diversity Index is divided evenly among all daily newspapers included in the market. In the absence of market-specific information on weekly newspaper availability, we make the most conservative assumption that there is one independently-owned weekly newspaper in each local market, and assign to it the entire weekly newspaper share.[943]

431. In terms of calculating the Index, within each medium we combine commonly-owned outlets and calculate each owner's share of the total availability of that medium. We then multiply that share by the share of the medium in question in the total media universe (television plus newspaper plus radio plus Internet). Once these shares in the overall "diversity market" have been calculated, we add together the shares of properties that are commonly-owned (e.g., a newspaper and a

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[943] In fact, there were 7,689 weekly newspapers in 2000, so it is likely that the average market has at least one weekly. *See* NAA, *supra* note 200 at *http://www.naa.org/info/facts02/13_facts2002.htm.*

television station), square the resultant shares, and sum them to get the base Diversity Index for the market in question.[944]

4. Cross-Media Limits

432. In this Section we modify our rules by adopting a new set of cross-media limits ("CML") in lieu of our former newspaper/broadcast and television/radio cross-ownership rules.. The CML have been designed specifically to check the acquisition by any single entity of a dominant position in local media markets -- not in economic terms, but in the sense of being able to dominate public debate -- through combinations of cross-media properties. Because we have traditionally relied upon blanket prohibitions on certain cross-media combinations, we have never before had to confront head-on the challenge of identifying specifically which types of markets give us the greatest cause for concern in terms of preserving diversity of viewpoint, and which types of transactions are most problematic in this regard. This effort is complicated by the nature of the public interest we are seeking to protect – diversity – which is as elusive as it is cherished.

433. Our modification of the newspaper/broadcast and television/radio cross ownership rules into a set of cross-media limits or CML is our first comprehensive attempt to answer this difficult and complex set of questions. The CML derives from data in the record regarding the relative reliance by consumers of various types of media outlets for news and information. To help us analyze that data, we use a methodological tool – a diversity index or "DI" – that allows us to measure the degree to which any local market could be regarded as concentrated for purposes of diversity. Based on an analysis of a large sample of markets of various sizes, the diversity index suggests that the vast majority of local media markets are healthy, well-functioning, and diverse.

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[944] Appendix C, Diversity Indices in Ten Sample Markets, contains the Diversity Index calculations for the ten markets examined in MOWG Study No. 1, based on the market structure as of November 2002.

434. Moreover, because we are adopting herein intra-service competition caps for radio and television properties, those caps will ensure that local markets will continue to be served by a diversity of voices within each of these respective services. By the nature of the exercise, markets defined for competition purposes are no broader than, and generally are narrower than, markets defined for diversity purposes. Thus, our radio and television competition caps will not only serve to promote and protect competition within the radio and television services, they will also be protective of diversity interests when television-only or radio-only transactions are at issue. For example, in a market with 12 TV stations, our intra-service caps guarantee at least six different owners of television stations. If there are forty radio stations in the market, our radio cap will ensure at least six different owners of radio properties.

435. We recognize, however, that our intra-service caps will not address diversity concerns that may result from cross-media combinations. Although our local radio and television caps will ensure a significant number of independent voices in larger markets, cross-media combinations in very small markets might result in problematical levels of concentration for diversity purposes. Accordingly, we are herein supplementing our two intra-service local rules with a narrowly drawn set of cross-media limits to reach those combinations that are not already prohibited by our television or radio caps, but which would give rise to serious diversity concerns. The cross-media limits are based on a set of assumptions drawn directly from the record evidence in this proceeding and premises that are consistent with past Commission policy and practice. Although we rely in part on our data analysis to help define the CML, we clearly respect that diversity is inherently subjective and cannot be reduced to scientific formula. We do believe, however, that greater use of empirical data and evaluation of that data can significantly strengthen the reasoning that underlies our expert judgment. The CML, therefore, ultimately rests on our

independent judgments about the kinds of markets that are most at-risk for viewpoint concentration, and the kinds of transactions that pose the greatest threat to diversity.

a. Competition Caps Protect Diversity

436. As set forth above, we have adopted a cap both on the number of television stations that any one owner may hold in a market, and on the number of radio stations that any one owner may hold in a market. These caps were designed to promote and protect competition within these two distinct services. The caps are, therefore, based on product market definitions that consider only those products or services that may be regarded as reasonable substitutes for competition purposes. We recognize, however, that although radio and television outlets may not compete in economic terms with other types of speech outlets, *e.g.*, newspapers, they all inhabit the mass media landscape that Americans turn to for news and information. In that sense, whatever the confines of their markets for competition purposes, many different outlets serve core democratic functions as purveyors of ideas, outlets for opinion, and distributors of news.

437. The data in the record evidence this difference. As set forth above, radio and television compete in economic terms in separate and distinct product markets. Both radio and television outlets, however, inhabit the larger speech market, as do several other types of entities. For example, MOWG Study No. 8, a consumer survey on media usage, reveals that, when asked to identify their primary source of all news and information -- both local and national -- , approximately 40% of Americans responded that broadcast television was their primary source and approximately 10% of Americans responded that radio was their primary source.[945] However, nearly 24% of respondents identified daily newspapers as their primary source of news and information, 18% identified cable

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[945] MOWG Study No. 8, Table 20.

news networks, 6% identified the Internet, and 2% identified weekly newspapers or magazines.[946] These figures track closely results from a Pew Research Center survey asking similar questions about Americans' use of media for news and information. When asked where they turned for their primary source of election news, 39% of respondents said broadcast television, 24% said cable television, 24% said newspapers, 9% said radio, and 5% said the Internet.[947] Other studies confirm that, today, Americans substitute among and between many different sources for news and information on a regular basis.[948] The record reflects, in short, that the "viewpoint" market in which television and radio stations participate is broader than the economic product markets, as defined by standard competition theory, in which either competes.[949] As a result, intra-service caps designed to ameliorate competition concerns necessarily also will protect against undue concentration of speech outlets for diversity purposes.

438. Our diversity index helps to illustrate this point. Pursuant to our new local radio rule, no single owner, even in the smallest markets, will own more than 50% of the radio outlets. In larger markets, the percentage of radio outlets that can be held by any one entity is considerably smaller. Thus, using the most extreme set of facts, and using Altoona, Pennsylvania, as our test case, the diversity index focused on local news and information alone (again, the most conservative assumption) reveals a relatively minimal impact on viewpoint diversity even should the radio outlets become split between only two owners. The current base case DI for local news and

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[946] *Id.*

[947] The Pew Research Center for the People and the Press, *Sources for Campaign News, Fewer Turn to Broadcast TV and Papers* (Apr. 27, 2003) at *http://people-press.org/reports/display.php3?PageID=243.*

[948] *See, e.g.*, UCLA Internet Report.

[949] Fox Comments, Owen Statement.

information for Altoona is 960.[950] If the local radio market were to become restructured into a duopoly, the DI would rise to only 1,156.[951] Again, this hypothetical posits the most extreme restructuring of radio outlets in the smallest market among those in our test cases. The change in the diversity index will be far smaller as a result of radio transactions in larger markets or where the restructuring is less extreme.

439. Similarly, pursuant to our new local television rule, no single owner will be permitted to own more than two television outlets in most markets. Using Altoona again, a two-TV combination raises the base DI for local news and information by only 64 points.[952] Indeed, using a set of randomly sampled markets of varying sizes, the average change in DI as a result of an owner of one television property buying another to create a television duopoly in a small market with only five licensed television stations is 91.[953] In markets with twenty licensed television stations the change in DI as a result of the creation of a television duopoly is only six.[954] Thus, although our intra-service television and radio caps are designed to protect and promote competition, they have a corollary benefit of also guarding against concentration in the viewpoint markets, at least with respect to intra-service combinations.

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[950] *See* Appendix C, Diversity Indices in Ten Sample Markets.

[951] *Id.*

[952] *Id.* In running this sample case, we assume that a duopoly would be permitted in the market even though, in fact, a new duopoly would not be permitted in Altoona under our new local television cap (Altoona has five stations and one existing duopoly; a second therefore would violate our top four restriction).

[953] *See* Appendix D, Diversity Index Scenarios.

[954] *Id.* We note, also, that our local television ownership cap includes a prohibition on top-four combinations. This will have the effect of prohibiting combinations of the local television stations most likely to produce and carry significant local news programming. Thus, although the top-four restriction is based on competition theory, the rule will also have beneficial effects on local diversity.

440. We recognize, however, that cross-media combinations that may impact the range and diversity of voices in local markets will not be captured by our television and radio caps. We therefore adopt, as described below, new cross-media limits targeted specifically and solely at the types of transactions that would give us the most concern and which are not already prohibited by our intra-service caps.

b. Foundations of the Cross-Media Limits

441. We begin with the proposition that, because this rule will limit the speech opportunities not only for broadcasters, but also for other entities that may seek to own and operate broadcast outlets (including those with the fullest First Amendment protection – newspapers), we should draw the rule as narrowly as possible in order to serve our public interest goals while imposing the least possible burden on the freedom of expression.[955] We also recognize that the tools that we are using to evaluate market diversity involve as much art as science. "Diversity" is not susceptible to microscopic examination; it cannot be mapped with any known formal system or reduced to mathematical equations. Although we attempt to measure it and assign some quantitative value to it in order to understand relative diversity of different types of markets, we recognize that this process is inherently approximate.[956] We must exercise great care, therefore, before categorically prohibiting any particular transaction or set of transactions as a prophylactic matter.

442. Nonetheless, it is apparent, based on the record in this proceeding, that certain types of transactions in certain markets

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[955] *See* FOEF Comments at 41-42; WVRC Comments at 43-44.

[956] Using the Diversity Index allows us to see different market characteristics in markets of different sizes. We have also found, however, that differentiating markets by the number of newspapers present is too blunt while differentiating markets by the number of radio stations is too fine. Therefore, we use the number of television stations as an identifier of market size.

present an elevated risk of harm to the range and breadth of viewpoints that may be available to the public.[957] Using our diversity index analysis and our independent judgment regarding desired levels of diversity, we first identify "at-risk" markets that might already be thought to be moderately concentrated for diversity purposes. We then identify the types of transactions that pose the greatest risk to diversity, and impose specific limits on those transactions in at-risk markets. Finally, because certain transactions in less concentrated markets pose a high risk of rapid concentration, we impose separate restrictions on transactions outside of the at-risk markets.

c. Identifying At-Risk Local Markets

443. We begin by identifying those markets most susceptible to high levels of viewpoint concentration; *i.e.*, those markets where our diversity concerns cut most deeply. At the outset, consistent with our past practice and precedent, we focus in this regard on local, not national, viewpoint market(s).[958] Evidence in the record before us supports the conclusion that the number of outlets for national news and information is large and growing, and that government regulation is thus unnecessary to protect it.[959]

444. With respect to local markets, our ten city study and our DI test cases reveal that most local markets today are well-functioning, healthy markets for speech.[960] For example, as of 2000, the largest media market in the country, New York City, had 184 different media outlets owned by 114 different

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[957] *Cf. 1975 Multiple Ownership Second Report and Order*, *supra* note 33 (in which we required divestiture in "egregious" newspaper/broadcast cases).

[958] *See* Policy Goals Section III, *supra*, and the Diversity Index, Section VI(C)(3), *supra*.

[959] *See* Appendix B, National News Sources.

[960] *See* MOWG Study No. 1.

owners.[961] Perhaps more impressively, the Burlington/Plattsburgh market – market 141 out of 287 – had 53 outlets owned by 34 different owners.[962] Even Altoona, Pennsylvania, market 255, had 23 outlets owned by 15 different owners.[963] That is, in the 255th ranked market, there currently are fifteen different independent voices.

445. Not all voices, however, speak with the same volume. Using our Diversity Index, we have examined the concentration of media outlets in the ten markets that were the subject of our Ten City Study using weighted voices. New York has a base DI for local news and information of 373; Lancaster, Pennsylvania, has a DI of 939; and Myrtle Beach, South Carolina, has a DI of 989.[964] Indeed, the average DI for all ten markets, which range from the largest to near the smallest, is 758.[965] A DI of 758 is the equivalent of 13 equally-sized firms.

446. Moreover, to ensure that the results of our ten city study were not anomalous, we have calculated the average DI for a different set of randomly selected markets, both large and

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[961] *Id.* Even though both MOWG Study No. 1 and Appendix C (Diversity Indices in Ten Sample Markets Study) used the same media markets, the number of outlets and owners in individual markets as described in MOWG Study No. 1 are different from the number of outlets and owners in Appendix C, Diversity Indices in Ten Sample Markets, for two reasons. First, MOWG Study No. 1 used outlet and ownership data that was current in 2000, in order to make a comparison between 1960 and 1980. The Diversity Indices in Ten Sample Markets Study used more current outlet and ownership data from 2002, in order to be more up-to-date. In addition, MOWG Study No. 1 included the "embedded" radio metro markets that are physically in the NYC metro, for illustrative purposes. The Diversity Indices in Ten Sample Markets Study used only the radio stations assigned to the NYC metro, for analytical purposes.

[962] *Id.*

[963] *Id.*

[964] *Id.*

[965] *Id.*

small.[966] The average DI for markets in which there are 20 television stations is 612; the average DI for markets in which there are 15 television stations is 595; the average DI for markets in which there are 10 television stations is 635; and the average DI for markets in which there are 5 television stations is 911 – all well below the point at which one would characterize them as highly concentrated if one were using the analogous HHI to measure competition in the market.[967]

447. We believe the analogy to the HHI is apt. The HHI is an indicator of economic concentration; it provides an analytical framework for determining when and if an entity or group of entities is likely to wield market power in an economic market. Our DI, which was inspired by and modeled after the HHI, similarly is an indicator of viewpoint concentration. Using the DI as an analytical tool, we can assign approximate weights to different types of media outlets, account for the diversity effects of commonly-owned properties, and measure relative concentration between and among markets. The DI can help us, therefore, identify the point at which an entity or group of entities is likely to wield inordinate power in the marketplace of ideas.

448. Although competition theory does not provide a hard-and-fast rule on the number of competitors necessary to ensure that the benefits of competition are realized, a market that has ten or more equally- sized firms normally can be considered fully competitive.[968] A 1000 DI correlates to market in which there are roughly ten firms with approximately equal market power. An 1800 DI would correspond to a market with six

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[966] *See* Appendix D, Diversity Index Scenarios.

[967] *Id.*

[968] A market with 10 or more equally-sized firms has an HHI of 1000 or less. DOJ/FTC regards markets in this region to be unconcentrated. Mergers resulting in unconcentrated markets are unlikely to have adverse competitive effects and ordinarily require no further analysis. *See DOJ/FTC Merger Guidelines* § 1.51.

roughly equal voices. Using our DI analysis of sample markets, we note that it is not until we reach markets with three or fewer licensed television stations that the average DI exceeds 1000, the point at which the market normally would be characterized as moderately concentrated for competition purposes.[969]

449. Our DI analysis of these sample markets, however, is not the end of our inquiry. Because of the importance we associate with maintaining diversity among the three principal platforms – newspaper, radio and television – for the expression of viewpoint at the local level, and because these same three outlets produce a large share of local news content,[970] we previously have used a "voice test" focused on one or more of these outlets for measuring diversity. Indeed, the *Sinclair* court suggested that our choice of an eight-voice test, then used in conjunction with the local television rule, was an exercise of agency discretion entitled to some deference.[971] Although we no longer are willing to base our rules upon the comparatively rudimentary eight-voice test, we continue to believe that unacceptable diversity losses can occur in very small markets when the principal distribution platforms for local news content come under common ownership and control. In larger markets, we expect that the number of distribution outlets for local news content will be larger, and that consumers will have greater access to secondary outlets for news and information.[972]

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[969] *See* Appendix D, Diversity Index Scenarios. The average DI for markets with three television stations is 1027; the average DI for markets with two television stations is 1316; and the average DI for markets with a single television station is 1707.

[970] CFA Comments at 32-39; UCC Comments at 23.

[971] *Sinclair*, 284 F.3d at 162.

[972] *E.g.*, *Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 15 FCC Rcd 20913, 20918 (2000) (broadband access in rural areas limited); *2001 Price Survey Report*, 17 FCC Rcd 6301, 6318 (2002) (low capacity cable systems in rural areas

450. Finally, we are concerned not merely with the absolute level of diversity that might already exist in any market or type of market, but also with the degree to which diversity might be sacrificed as a result of likely transactions. Accordingly, in defining "at-risk" markets, we have used our DI and sampled the effect of transactions, in large and small markets, involving heavily used sources of local news and information.[973] In so doing, we have focused on the types of transactions that most likely will lead to large DI changes and rapid concentration. Our line-drawing effort is informed by the approach the DOJ has taken in assessing competition issues. Although DOJ policy is to review any transaction in a moderately concentrated market that would result in a change in HHI of 100 points or more, we have found no case in many years in which DOJ has filed suit to block a merger that produced less than a 400 or more point HHI change.[974] Based on our analysis, cross-media combinations involving newspaper and television, newspaper and radio, or radio and television properties do not produce a

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offer fewer channels and are less likely to have stand-alone local or regional cable news channels).

[973] *See* Appendix D, Diversity Index Scenarios.

[974] Under the *FTC/DOJ Merger Guidelines*, an HHI between 1000 and 1800 suggests a moderately concentrated market, and an HHI above 1800 suggests a highly concentrated market. Where the post-merger market would be in the moderately concentrated range, the *Guidelines* suggest that a merger that increases the HHI by more than 100 points will, absent other factors, present antitrust concerns. Where the post-merger market would be in the highly concentrated range, the *Guidelines* suggest that a merger producing an increase in the HHI of more than 100 points, absent other factors, is presumed to create or enhance market power or facilitate its exercise. *FTC/DOJ Merger Guidelines* ¶ 1.51. However, in the cases we found over the past 15 years, the FTC or the DOJ has filed suit to block a merger only when the change in the HHI is at least four times greater than the *Guideline's* standards. *See, e.g., FTC v. Illinois Cereal Mills, Inc.*, 691 F. Supp. 1131 (N.D. Ill., E. Div. 1988); *U.S. v. Georgia-Pacific Corp.*, 1996 W.L. 634212 (D. Del. 1996). In the majority of cases, the proposed merger would have resulted in a change in the HHI in excess of 1,000 points.

change in the DI of anything even approaching that magnitude other than in markets with three or fewer television stations.[975] For example, a newspaper/radio combination in markets with only two licensed television stations produces a DI change of more than 300 points, a television/radio combination in markets of that size produces a DI change of 301 points, and a newspaper/television combination in markets of that size produces a DI change of 731 points. A newspaper/television combination in a market with three licensed television stations produces a DI change of 331 points.[976]

451. These changes, of course, reflect approximations based upon sample data and are provided only to be illustrative of the diversity losses that can occur as a result of cross-media combinations in small markets. Nonetheless, based on all of the foregoing, we conclude that a market with the equivalent of ten or more equally-sized firms cannot be regarded as even moderately concentrated for diversity purposes. In light of that conclusion, and in consideration of the properties of small markets and on our analysis of potential transactional impacts in those markets, we conclude that markets with three or fewer licensed television stations should be regarded as "at-risk" markets for purposes of diversity concentration. Markets of that size, we expect, will be moderately concentrated and subject to rapid concentration if cross-media combinations are created involving radio, television and/or newspaper properties.[977] Accordingly, we will prohibit certain cross-

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[975] *See* Appendix D, Diversity Index Scenarios.

[976] The calculated changes in the Diversity Index for these markets are premised on the assumption that the radio markets have consolidated to the maximum extent permissible under our new local radio ownership rule. On this basis, this is a "worst case" estimation of the impact of newspaper/radio and television/radio combinations under the Diversity Index.

[977] A market with an HHI of more than 1800 is regarded as highly concentrated. We noted above that a DI of 1800 would correspond to six equally-sized "voices." Because of the amorphous nature of diversity as an interest and the difficulty of measuring it with precision, we decline to draw

media combinations involving those properties in markets with three or fewer television stations.[978]

d. Local Cross-Media Limits in At-Risk Markets

452. With respect to the limits themselves, we tread lightly in view of the sensitive First Amendment interests at stake and the deregulatory purpose of Section 202(h). Our intent is to draw our rules narrowly, focusing on those transactions that are likely to have a substantial impact on the diversity of voices available in the market. The record shows that broadcast television, daily newspapers, and broadcast radio are the three media platforms that Americans turn to most often for local news and information.[979] They are, accordingly, the focus of our diversity concerns, and we decline to impose any cross-media limit on transactions involving media properties other than radio, television, and newspaper outlets.

453. Further, we are establishing rules of nationwide applicability. We desire, therefore, to provide the industry and the public with clear, easy to administer rules reflective of common market trends and characteristics. We recognize that, in any given market, the lines we draw here may appear under- or over-inclusive. Indeed, that quality inheres in the nature of

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an absolute line prohibiting transactions that would take a market beyond the 1800 DI (*i.e.*, six voice) level. The rules we are adopting herein, however, are intended to protect against markets becoming highly concentrated – in a qualitative sense – for diversity purposes.

[978] When we originally crafted the newspaper/broadcast rule we required divestiture of either a newspaper or a broadcast station in a limited number of so-called "egregious" cases. We defined the relevant market in those cases as the area encompassed by the city-grade signal of the relevant broadcast station. Divestiture was required where the only daily newspaper was published in a community within the city-grade signal of the only commercial television (or only commercial radio station in cases where no local TV station also existed) where the newspaper and the broadcast station were commonly owned. *See generally 1975 Second Report and Order*, *supra* note 33.

[979] *See* MOWG Study No. 8, Table 97.

proscriptive rules themselves. Nonetheless, our analysis of the record in this proceeding gives us confidence that our rules will prevent the transactions that would seriously impair the availability of diverse viewpoints in any local market while permitting efficiency enhancing combinations. Again, although they have a methodological foundation in the DI, these judgments are based on agency expertise and experience dealing with broadcast markets and the media industries generally. Accordingly, except as specifically prohibited herein, cross-media combinations will not be subject to anything other than routine Commission review, i.e., unless the transaction is barred by the CML or our other ownership rules, the combination is permissible under our rules, and we will not apply the DI to it.[980]

454. As explained below, combinations of daily newspaper and broadcast properties in at-risk markets present a serious threat to local viewpoint diversity.[981] We therefore, adopt a rule prohibiting common ownership of broadcast stations and daily newspapers, and TV/radio combinations, in markets with three or fewer television stations. In order to determine which markets have 3 or fewer broadcast television stations, we will rely on Nielsen television Designated Market Areas (DMAs). We include for these purposes, commercial and noncommercial television stations assigned to the DMA. This is consistent with our overall measurement of the DI, explained above, as we

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[980] Bright lines provide the certainty and predictability needed for companies to make business plans and for capital markets to make investments in the growth and innovation in media markets. Conversely, case-by-case review of even below-cap mergers on diversity grounds would lead to uncertainty and undermine our efforts to encourage growth in broadcast services. Accordingly, petitioners should not use the petition to deny process to relitigate the issues resolved in this proceeding.

[981] *See, e.g.*, NABOB/Rainbow, PUSH Comments at 23-24; Gray Comments at 16-19.

assume that all television stations in the DMA are viewable in the radio metro with which it is paired.[982]

455. A number of parties have questioned whether a cross-ownership rule applicable to entities other than broadcasters, *e.g.*, newspaper owners, would be constitutional.[983] We continue to believe that a narrowly-drawn rule prohibiting or limiting common ownership of broadcast properties and daily newspapers is consistent with our constitutional framework. Our current newspaper/broadcast cross-ownership rule has been upheld by the Supreme Court against constitutional challenge[984] and, as discussed above,[985] broadcast/newspaper and radio/television cross-ownership rules, like broadcast ownership rules, are reviewed under the rational basis standard.[986] We believe that our new cross-media limits satisfy this standard because they are "a reasonable means of promoting the public interest in diversified mass communications,"[987] and they are founded on a substantial record. Nevertheless, we are mindful of the court's concern in another context, where a higher standard of constitutional scrutiny applied, that our rules should focus on those markets and transactions that are likely to result in substantial, rather than only incremental, changes in diversity.[988] Our new cross-ownership rules accomplish this because they are narrowly tailored to restrict cross-ownership only in select markets.

456. *Television-Newspaper.* Nielsen survey data reveal that daily newspapers and broadcast television remain the two most

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[982] *See* ¶ 428, *supra.*

[983] Media General Comments at 37; Tribune Comments at 17-28; Fox Comments at 50-51.

[984] *See NCCB, supra*, note 20.

[985] *See* Legal Framework, Section II, ¶¶ 13-16, *supra.*

[986] *Id.*

[987] *NCCB*, 436 U.S. at 802.

[988] *Time Warner II*, 240 F.3d at 1135.

important sources of local news and information.[989] The importance of these outlets is reflected in our DI. As noted above, a combination of a daily newspaper and a television station in a market with only three television stations leads to an average DI change of 331 points. These combinations in markets with only two or one television station lead to DI changes of 731 and 910 DI points, respectively. In these at-risk markets, a single combination of a daily newspaper and a television station could quickly jeopardize the range of viewpoints available to consumers in the market. We therefore, adopt a rule prohibiting the combination of a daily newspaper and a broadcast television facility in any market with three or fewer television properties. To trigger the rule, we will count all television stations assigned to the DMA that contains the newspaper's community of publication. We presume that broadcast television stations are generally carried throughout the DMA to which the station is assigned. Our rules will not, however, bar a broadcast television station in such a market from starting a new newspaper, as that would expand, not decrease, diversity.

457. One additional issue in the cross-interest context is the definition of "daily newspaper" for the purposes of newspaper/broadcast cross-ownership. Currently, Note 6 to the multiple ownership rule defines a daily newspaper as "one which is published four or more days per week, which is in the English language and which is circulated generally in the

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[989] Approximately 28.8 percent of Americans rely on newspapers as a source of local news and information, and 33.8 percent use broadcast television for this purpose. These figures are derived from normalizing the figures in MOWG Study No. 8, Table 097. Because respondents were asked what sources they had used in the previous 7 days for local news and information, and because many respondents listed more than a single source, the totals in the Table add up to more than 100%. Also, magazines were excluded from the normalizing process as they typically are not sources of local news.

community of publication."[990] Commenters raised the issue of the English language requirement when applied in Puerto Rico where the Spanish language is the dominant language.[991] Caribbean argues that the Commission expressly rejected requests to exempt Puerto Rico from the rule at the time of its adoption and recognized that the goals underlying the rule were of equal concern in Puerto Rico as on the mainland.[992] Both Caribbean and Arso argue that the exclusion of foreign language newspapers also allows for the exercise of market power by the dominant newspapers in Puerto Rico which, due to the exclusion of non-English newspapers, could be owned in tandem with broadcast stations in the market.[993]

458. The exclusion of non-English language daily newspapers in areas where the dominant language of the market is not English creates a discrepancy in treatment that must be ended. As Caribbean notes, in adopting the original newspaper/broadcast cross-ownership rule, the Commission recognized that the need for diversity in Puerto Rico was the same as that elsewhere. Since the definition of a daily newspaper was adopted in 1975, the percentage of households in which Spanish has spoken has approximately doubled.[994] It is appropriate, therefore, at this point in time, that we apply the CML to non-English daily papers in markets in which the language that they are printed in is the dominant language of their market.[995] While the example of Puerto Rico was

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[990] 47 C.F.R. § 73.3555 Note 6.

[991] Arso Comments at 1-4; Caribbean Comments in MM Docket No. 01-235 at 22-35.

[992] Caribbean Comments in MM Docket No. 01-235 at 22.

[993] *Id.* at 30-38. Arso Comments at 3-4.

[994] In 2000, Spanish was the language spoken at home in 10.5 % of American households. *See www.census.gov*. In 1980, the percentage was 5.3%. This is derived from data contained in INFORMATION PLEASE ALMANAC (Otto Johnson ed., Houghton Mifflin Co. 1995) at 835.

[995] As previously indicated, to trigger the rule, we will count all television

addressed in the comments, there may be other communities to which this will apply now or in the future. Those whose primary language is not English deserve the same protections of diversity and competition as do English speakers. Accordingly, for purposes of applying the CML to newspaper/broadcast transactions we will change the definition of daily newspapers to include non-English dailies printed in the primary language of the market.

459. *Radio-Newspaper.* Although broadcast radio generally has less of an impact on local diversity than broadcast television, according to the results of our Nielsen survey, discussed above, in at-risk markets the combination of a daily newspaper with one or more broadcast radio facilities can nonetheless have significant negative implications for the range of viewpoints available. Indeed, markets with three or fewer television stations have, on average, only 21 radio stations.[996] Under our radio cap, a single owner in a market with 21 stations could own six stations, or 29% of all the radio outlets in the market. Combining such a station group with, perhaps, the only daily newspaper could, therefore, seriously impair the range of independent viewpoints available in the market.[997] Again, based on a sample of markets with three or fewer television outlets, we find that the change in DI as a result of a newspaper-radio combination, assuming that the radio owner has reached the radio ownership cap under our new local rules,

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stations assigned to the DMA that contains the newspaper's community of publication. For the purposes of evaluating whether the non-English daily is printed in the primary language of the "market," however, the market shall be defined as the newspaper's community of publication.

[996] BIA Master Access Data Base (Nov. 2002).

[997] Although any given market may have more than one daily newspaper, and of course every radio owner does not buy stations up to the regulatory limit, we are adopting general rules of nationwide applicability. Accordingly, we are positing for these purposes that the market is as concentrated as possible consistent with our other local rules.

would be 242 points or higher.[998] Given that markets of three television outlets begin with an average DI of 1027, which we regard as the beginning of the moderately concentrated range, a 242 point DI increase moves the market substantially toward a highly concentrated state. We therefore, adopt a rule prohibiting the combination of a daily newspaper and a broadcast radio facility in any market with three or fewer television properties.[999] To trigger the rule for newspaper/radio combinations we will retain our current standard. That standard requires complete encompassment of the newspaper's community of publication by the requisite signal strength contour of the commonly owned radio station(s).[1000]

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[998] *See* Appendix D (Diversity Index Scenarios).

[999] Again, we note that this rule does not apply in the event that a broadcast licensee seeks to found a new daily newspaper in the market.

[1000] For AM radio stations that standard is complete encompassment of the newspaper's community of publication by the predicted or measured 2mV/m contour computed in accordance with § 73.183 or § 73.186 of the Commission's Rules. For FM radio stations the standard is complete encompassment of the newspaper's community of publication by the 1 mV/m contour computed in accordance with § 73.313 of the Commission's Rules. Previously, we discussed the inherent flaws in defining radio markets using a contour-based definition, and decided to move to a geographic based definition. Specifically, we found that a contour based definition for defining radio markets can create inconsistencies in counting stations that comprise a market, counting stations that an entity owns in a market, and determining a radio market's size and geographic area. *See* Local Radio/Problems with the Existing Radio Market Definition and Counting Methodologies, Section VI(B)(1)(a)(ii)(a), *supra*. However, such problems do not arise in the context of using contours to determine whether the cross-media limits rule is triggered. Here, we are concerned with the physical proximity of the broadcast station and the newspaper's community of publication, or in the case of radio/television cross-ownership, we are concerned with the relative distance between two specific stations. Because the cross-media rule relies, in part, on a geographic location, *i.e.* the community of publication or the communities of license, parties cannot take advantage of such discussed inconsistencies to circumvent the rules. Moreover, we are not relying on a contour-based definition to define a cross-media market; we are only using it to determine whether the rule is

460. *Television-Radio.* Combinations involving daily newspapers and broadcast properties are not the only cross-media combinations that present diversity concerns in at-risk markets. Approximately one-fourth of Americans rely on radio as a source of local news and information, and one-third use broadcast television for this purpose.[1001] Cross-media combinations involving television and radio properties also, therefore, are likely to give rise to systematic diversity concerns in at-risk markets. Our DI analysis confirms this fact.[1002] We therefore adopt a rule prohibiting the combination of broadcast radio and broadcast television facilities in any market with three or fewer television properties. In such markets, we will not permit an owner of a TV station to own any radio stations in the market, and vice versa. Although this modification is more stringent than our current radio/TV cross-ownership rule in a limited number of markets,[1003] the overall thrust of our CML approach has been to eliminate regulatory restrictions where they are unnecessary.[1004]

461. The television/radio cross-ownership rule is triggered when the radio station's community of license is in the commonly owned television station's DMA. Similar to requests for waiver of the newspaper/broadcast cross-ownership rule, parties seeking waiver of the television/radio

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triggered.

[1001] MOWG Study No. 8, Table 097. The figures above are derived from normalizing the figures in Table 097. Because respondents were asked what sources they had used in the previous 7 days for local news and information, and because many respondents listed more than a single source, the totals in the Table add up to more than 100%. Magazines were excluded from the normalizing process because they typically are not used for local news.

[1002] *See* Appendix D, Diversity Index Scenarios.

[1003] 47 C.F.R. § 73.3555(c).

[1004] We discuss grandfathering of existing combinations in these markets below. See Grandfathering and Transition Section VI(D), *infra.*

cross-ownership rule can rebut this by showing that the stations' signals do not overlap and the television station is not carried on cable systems in the radio station's market.

5. Additional Cross-Media Limits in Small to Medium-Size Markets

462. Although markets with four or more licensed television stations do not qualify, in our judgment, as at-risk markets, a combination of a daily newspaper with a television duopoly and a significant radio presence can, in small to medium-size markets result in substantial changes in the level of diversity. For example, assuming that owners of broadcast properties are constrained only by our local radio and television caps (*i.e.*, they may acquire stations up to the cap in either service), a newspaper owner might attempt to acquire a television duopoly and several radio properties within the same market. Referring again to our sample markets we find that, in a five-television market, a combination of a newspaper, a television duopoly, and as many radio stations as permitted by the applicable local radio cap results in an average DI change of 846 points. Indeed, even in an eight-television market, the resulting average DI change from such a newspaper/TV duopoly/radio combination DI is 734 points. Given that eight-television markets begin, on average, with a DI of almost 900 points, changes of this magnitude can lead quickly to a highly concentrated market.

463. We notice a dramatic difference, however, in the base DI, and in the DI changes that result from a combination involving a newspaper, a TV duopoly, and a radio station group, between our sample markets that have four to eight television stations and those that have nine or more television stations. The base DI for markets with eight television stations is still almost 900 points – nearly in the moderately concentrated range; there is almost a 200 point difference between these markets and those with nine television stations, which, in our sample, have a base case DI of 705 points. In

addition, although a newspaper/TV duopoly/radio combination produces a change of over 700 points in an eight television market, bringing the DI up to approximately 1600 points, the change is fewer than 500 DI points in a nine television market, bringing the DI up to only 1200 points. These numbers accord with our experience and judgment regarding the operation of small to medium-size markets, and are supported by other evidence in the record.[1005]

464. We also note significant differences between the DI changes that result from newspaper/TV combinations in markets with between four and eight television stations and those with nine or more television stations. Using our sample markets, a newspaper combining with a television duopoly in a market with only five television stations leads to an increase in the DI of 376 points. Even in markets with eight television stations, the average DI increase as a result of such a combination is over 300 points. In markets with nine television stations, however, the DI increase from a merger of a newspaper with a television duopoly is only 172 points; it is about 100 points in markets with ten televisions.[1006] The potential for rapid concentration that may result from a combination of a newspaper with a television duopoly in markets with between four and eight licensed television stations ("small markets") leads us to conclude that it would be prudent, in these markets, to impose additional local ownership restrictions as part of our CML.

[1005] *See, e.g.* Buckley Comments at 4-5; UCC Comments at 16-17, 40-41.

[1006] Because of the number of radio stations in the markets observed for our sample of seven-television-station markets, the DI increases in those markets are smaller than those in eight TV markets. This deviation does not undermine, in our judgment, the more general conclusions that we draw from the data and from our DI methodology regarding the markets most at risk for viewpoint concentration (*i.e.*, we do not deem markets with seven television stations, in general, to be less at risk than markets with eight television stations).

465. We are cognizant, however, of the fact that substantial public interest benefits may flow from broadcast/newspaper combinations. As discussed above, television stations that are co-owned with daily newspapers tend to produce more, and arguably better, local news and public affairs programming than stations that have no newspaper affiliation. Because of the news resources available to local newspapers, we expect similar benefits to be associated with newspaper ownership of radio stations (*e.g.*, radio stations affiliated with a local newspaper may have an enhanced ability to produce local, all-news radio programming and to cover local political and cultural events in greater depth than stations unaffiliated with a newspaper). Accordingly, we are not inclined to prohibit outright newspaper/ broadcast combinations in markets with 4 – 8 television stations (referred to below as "small to medium size markets").

466. Balancing these interests, we believe it appropriate, in small to medium size markets (those with between four and eight television stations) to allow the following: 1) one entity may own a combination that includes radio, television and newspaper properties, but the entity may not exceed 50% of either of the applicable local radio or the local television caps in the market; 2) a radio station group owner that also owns a newspaper in the market, but which does not own any television properties in the market, may acquire radio stations up to 100% of the applicable radio cap. In these small to medium size markets, therefore, we will prohibit: television broadcasters that also own a daily newspaper in the market from having a television duopoly in that market; a broadcaster with a duopoly from obtaining a daily newspaper in the same DMA; a newspaper owner from purchasing more than a single television station within the DMA; and a radio station owner that also owns a daily newspaper and a television station in the

market from exceeding 50% of the applicable radio cap for the market.[1007]

467. We believe that this CML achieves an appropriate balance in small to medium size markets between fostering the production of high quality local programming and protecting diversity. To begin with, the public interest benefits of newspaper ownership (the benefits of cross-fertilization between media) likely are realized primarily in the first broadcast station co-owned in either service. Although there may be economic benefits to the owner from more extensive combinations, it is not as clear that those benefits will accrue to the public in any meaningful way; at least the public interest component of these benefits is likely to decline incrementally as the number of stations increases. Given that no owner will be permitted, in accordance with our local television cap, to hold more than two television stations in a small to medium size market, a limit of one station in these markets for owners of local newspapers will maximize the public interest benefits, while reducing any loss of diversity. Although the loss of diversity that might result were that owner to add a significant radio presence in the market warrants a further 50% limit in the number of radio properties that owner might hold, such is not the case if the combination does not include any television properties.

468. Again, our DI and a set of sample markets help to illustrate the fact that our modified 50% CML for newspaper

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[1007] For these purposes, we use the Arbitron or contour-overlap market definitions discussed above in determining whether the newspaper and a radio station serve the same market. We are not imposing a limitation that would preclude a top four television station in a market from being combined in common with a newspaper or radio station similar to the restriction imposed in the local television rule context. The top four restriction imposed under the local TV ownership rule is specifically designed to protection competition, as fully discussed in that section. The cross-media limit, on the other hand, is designed to protect viewpoint diversity, not economic competition.

combinations in small to medium size markets will significantly reduce any loss of diversity that might result from efficiency-enhancing newspaper/broadcast combinations. In a five-television station market, a combination involving a newspaper, a TV duopoly and a radio station group at the radio cap would result in an average DI increase of 846 points, which would take the market to 1757 points, near the highly concentrated range.[1008] If the combination is limited to a single television station and no more than 50% of the applicable radio cap, the DI change is 393 points, a decrease of 453 points. In an eight-television market, a combination involving a newspaper, a TV duopoly, and a radio station group at the cap results in an increase in the average DI of over 700 points. By limiting the combination to 50% of both the television cap and the radio cap, the DI increase is reduced to 314 points.

469. Similarly, whereas a combination involving a newspaper and a television duopoly alone will, on average, raise the DI of a five-television station market by 376 points, a combination involving a newspaper and a single television station in a market of that size will raise the DI, on average, only 223 points. The difference is more dramatic in markets with eight licensed television stations, where the average DI increase drops from 308 points to only 152 points for a newspaper/TV duopoly combination. Newspaper/radio group combinations result in significantly lower levels of viewpoint concentration when the combination does not include any TV properties. Accordingly, we will permit newspaper/radio combinations in small to medium size markets, provided they comply with the local radio rule.

470. Similarly, our DI analysis indicates that radio/television combinations in small to medium size markets result in relatively small DI changes. For example, in a market with only four television stations, a radio television combination,

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[1008] Under the *DOJ/FTC Merger Guidelines*, an HHI above 1800 suggests a highly concentrated market.

even assuming the radio owner holds the maximum number of stations permitted under our local radio cap, results in a DI change of fewer than 150 points.[1009] Such a combination in a market with eight television stations results in a DI change of fewer than 100 points.[1010]

471. We have engaged in this analysis using our DI and a randomly selected sample of markets not with the idea of slavishly following the numbers that our index generated, but to confirm and support the judgments we make regarding the kinds of markets that are most susceptible to viewpoint concentration, and the kinds of transactions that are most likely to have a significant impact on the level of diversity available in any given market. As noted above, we do not believe that markets with between four and eight television stations can be regarded as moderately concentrated for viewpoint purposes or otherwise "at risk." We do, however, believe, and our DI confirms, that these markets are approaching a level of viewpoint concentration that we would regard as moderate, and we are concerned that some combinations involving the three major sources of local news and public affairs information in these markets would lead to inordinate diversity losses. Accordingly, we will permit television/radio combinations in small to medium size markets, provided they comply with the local radio and television rules.

472. In markets with 9 or more TV stations, we will permit any newspaper and broadcast cross-media combinations that comply with our local TV ownership rule and local radio rule. These tiers are derived from our DI analysis and our judgment as to what markets are sufficiently diverse so that combined newspaper/broadcast ownership would not unduly harm diversity.

[1009] *See* Appendix D, Diversity Index Scenarios.

[1010] *Id.*

473. With respect to markets with nine or more TV stations ("large markets"), we impose no cross-media restrictions. To begin with, markets of this size today tend to have robust media cultures characterized by a large number of outlets and a wide variety of owners. New York City, for instance, which has 23 licensed television stations, 61 radio stations, and 21 daily newspapers, had 61 different owners of broadcast stations and daily newspapers as of November 2002.[1011] Using our diversity index as a measure, New York City today has a base DI of only 373.[1012] More striking, perhaps, is the example provided by Kansas City, Missouri, which has only nine licensed television stations. Our Ten City Study reveals that Kansas City had 35 different owners and our Diversity Index analysis shows that Kansas City has a base DI today of only 509.[1013]

474. Again, to ensure that the results of our Ten City Study were not anomalous, we conducted a DI analysis on a random sample of markets of various sizes, including markets with nine licensed television stations, markets with ten television stations, markets with fifteen television stations, and markets with twenty television stations. Among our sample markets, the average DI for those with nine television stations is 705; the average DI for those with ten television stations is 635; the average for those with fifteen television stations is 595; and the average DI for those with twenty television stations is 612.[1014] That is, markets with nine or more television stations today are very much un-concentrated.

475. The local radio and local television caps adopted herein will help to ensure that large markets continue to be served by a large number of different local media owners. For example,

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[1011] *See* Appendix C, Diversity Indices in Ten Sample Markets.

[1012] *Id.*.

[1013] *See* MOWG Study No. 1 and Appendix C, Diversity Indices in Ten Sample Markets.

[1014] *See* Appendix D (Diversity Index Scenarios).

positing Kansas City, Missouri, again as a typical market of nine television stations, and assuming that four television duopolies could in fact be created in that market, and further assuming maximum radio consolidation under our new local radio rule, there should still remain five different owners of television stations and seven different owners of radio stations.[1015] There currently also are five daily newspaper owners serving the market. Therefore, even assuming that, in the absence of any cross-media limit in the market, the owners of the radio, television, and newspaper properties combine to the maximum extent possible, there would remain at least seven different owners of local media in the market, each with a significant presence. In accordance with the mandate of Section 202(h), we do not believe that we can justify a restriction in a market where the worst case scenario (indeed, one that may not even be possible given existing combinations in the market), still results in a market with at least seven different owners of the major sources of local news and information.

476. More realistically, although some cross-media combinations are likely to occur in the absence of a restriction, constraints imposed by existing groups and the presence of public stations that cannot be acquired by commercial entities make it highly unlikely that Kansas City, or any market, will consolidate to the level described in the preceding paragraph. In order to get a better sense, therefore, for the actual affect of various cross-media combinations in markets with nine or more

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[1015] *See* Appendix C (Diversity Indices in Ten Sample Markets). That is, in a market with nine television stations, four duopolies can, in theory, be created, leaving one singleton station, so that five owners of television stations would remain. If there are forty-four radio stations in the market, and group owners assembled the largest combinations possible under the radio cap (seven), there would remain at least seven group owners; six with groups of six stations and one with a group of two stations.

television stations, we use our DI in sample markets and test hypothetical combinations.[1016]

477. Beginning in markets with nine licensed television stations, we see that, on average, the change in DI that would result from a television owner acquiring a radio group consisting of the maximum number of radio stations permissible under our local radio rule is only 64 points.[1017] If instead it were the owner of a daily newspaper acquiring that radio group, the DI change would be 198 points, leaving the market below 1000 DI.[1018] If the owner of a daily newspaper were to purchase a television station instead of a large radio group in a market of this size, the DI would increase only 86 points.[1019] Indeed, the largest combination possible in the market – a combination that would include a daily newspaper, a television duopoly, and a large radio group – would result in a DI increase of 473 points, taking the average nine television market to a base DI of under 1200 points, only marginally in the range that we would consider moderately concentrated.[1020]

478. As detailed in Appendix D (Diversity Index Scenarios), in markets with ten television stations, the average base DI is 635 and the increase that would result from the assemblage of the largest media combination possible would be 292 points – leaving the market un-concentrated.[1021] In markets with fifteen television stations, the average base DI is 595 and a newspaper/television duopoly/large radio group combination would increase the DI only 302 points.[1022] Similar results obtain in markets with twenty television stations.

[1016] *See* Appendix D (Diversity Index Scenarios).

[1017] *Id.*

[1018] *Id.*

[1019] *Id.*

[1020] *Id.*

[1021] *Id.*

[1022] *Id.*

479. This analysis is premised on the creation of very large combinations of media properties at the local level. Even so, the results show that markets with nine or more television stations are un-concentrated today and are unlikely to become highly concentrated even in the absence of cross-media limits. Section 202(h) requires that we justify broadcast ownership limits on more than supposition or inchoate fears; our governing law requires that we target our structural limits at real and demonstrable harms. Based on the foregoing, we cannot, therefore, justify cross-media restrictions in markets with nine or more licensed television stations.

480. The tiers adopted above – "at-risk" markets, "small to medium size" markets, and "large" markets – are derived from our DI analysis and our independent judgment regarding market operation and the effect of various combinations on diversity. Our diversity concerns are greatest in at-risk markets and we have accordingly prohibited all forms of cross-media combinations in those markets. In small to medium markets we have imposed specific limitations on particular kinds of combinations that would, in our estimation, most likely result in unacceptable harm to viewpoint diversity. In large markets, our analysis indicates that no cross-media limit is necessary, nor can one be justified, given the large number of outlets and owners that typify these markets and the operation of our intra-service television and radio caps.

481. *Conclusion.* Although we generally prohibit television-radio, and newspaper-broadcast, cross-ownership in at-risk markets, and we limit newspaper-broadcast combinations in small to medium size markets, we recognize that special circumstances may render these cross-media limits unnecessary or counter-productive in particular markets. Accordingly, we will continue to entertain requests for waiver of these cross-media limits and, in particular, will give special consideration to waiver requests demonstrating that an otherwise prohibited combination would, in fact, enhance the quality and quantity of

broadcast news available in the market.[1023] In addition, of course, we will review our entire local broadcast ownership framework, including our new cross-media limits, beginning next year, in our 2004 biennial review. We will not, however, permit collateral attack upon our rules in individual cases on diversity grounds based upon more particularized showings using the DI in a given market. The rules we adopt herein are rules of general applicability. The lines that have been drawn and the judgments that have been made reflect our conclusions regarding the probable effects of given transactions in the run of cases. Those conclusions necessarily rely upon generalizations, approximations, and assumptions that will not hold true in every case. Indeed, many of these assumptions would not be true in a particular context or specific market. As we stated above, the Diversity Index itself is a blunt tool capable only of capturing and measuring large effects and general trends in typical markets. It is of no use, therefore, for parties to attempt to apply the DI to a particular transaction in a particular market.

D. Grandfathering and Transition Procedures

1. Grandfathering Provisions

482. *Existing Combinations.* There may be some existing combinations of broadcast stations that exceed the new ownership limits due to the modifications of both the local TV and the local radio ownership rules. Because the modified local TV rule permits increased common ownership of local TV stations, we expect few existing ownership combinations to

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[1023] As is the case with our new local television ownership rules, we will require that a licensee who obtains a waiver of our cross-media limits show at renewal time the benefits that have accrued to the public as a consequence of the waiver. At the end of the broadcast station's (or stations') license term(s), the licensee of the station(s) must certify to the Commission that the public interest benefits of the Commission's grant of the waiver are being fulfilled. This certification must include a specific, factual showing of the program-related benefits that have accrued to the public. Cost savings or other efficiencies, standing alone, will not constitute a sufficient showing.

violate the rule adopted herein. However, some existing same-market combinations may not comply with the modified TV ownership rule because of the elimination of the Grade B overlap exclusion that is in the current rules. In addition, there may be instances in which a party currently owns a radio/television combination that may not comply with the new cross-media limits.[1024]

483. As for radio, we are modifying the definition of many radio markets, replacing the existing signal-contour based definition with a geographic based market definition.[1025] This may result in a different number of stations being considered as participating in a local radio market. Because our radio ownership rule is based on a tiered system, if fewer stations comprise the radio market, and the market falls into a smaller tier, then the number of stations an entity may own would decrease. We also are attributing in-market radio JSAs, which could increase the number of radio stations that count toward an entity's numerical ownership limit.

484. We are persuaded by the record to grandfather existing combinations of radio stations, existing combinations of television stations, and existing combinations of radio/television stations.[1026] As such, we will not require

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[1024] While we are not aware of any existing newspaper/broadcast combinations that have been previously grandfathered or approved by the Commission that would be barred under the new rules, to the extent such combinations do exist, they will be subject to the grandfathering and transferability provisions described in this section.

[1025] We are retaining a modified contour-based definition outside of Arbitron markets until we have completed a rulemaking to define geographic radio markets in these areas. The grandfathering and transition procedures adopted herein apply to Arbitron and non-Arbitron areas. In areas not defined by Arbitron, through the completion of the rulemaking, licensees should apply the modified contour-based market definition for these purposes.

[1026] We requested comment on grandfathering issues in the Radio NPRMs: *Radio Market Definition NPRM*, 15 FCC Rcd at 25081-82 ¶ 11; *Local Radio*

entities to divest their current interests in stations in order to come into compliance with the new ownership rules.[1027] As suggested by commenters, doing so would unfairly penalize parties who bought stations in good faith in accordance with the Commission's rules.[1028] Also, we also are sensitive to commenters' concerns that licensees of current combinations should be afforded an opportunity to retain the value of their investments made in reliance on our rules and orders. We also agree with the commenters that argue that compulsory divestiture would be too disruptive to the industry.[1029] On

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Ownership NPRM, 16 FCC Rcd at 19888 ¶ 65.

[1027] Secret proposes that we grandfather general radio station ownership limits for markets rather than grandfathering specific ownership combinations. In the alternative, it proposes that we permit any broadcaster to own at least as many stations as the largest group owns presently in the specific market. Secret Comments in MM Docket No. 00-244 at 4. Secret's approach is administratively problematic, requiring the Commission to create and monitor a range of numerical limits in all of the Arbitron metros, as well as in non-Arbitron areas. Moreover, it would create disparate treatment in radio markets, not based on competitive analysis or public interest assessment, but based solely on existing combinations. Because these existing combinations were created using the current contour-based market definition, which we find does not promote our competition goals, some combinations may raise competition concerns and may violate the new rules. To allow additional groups to obtain the same numerical limits would only exacerbate such concerns.

[1028] *See, e.g.*, NAB Comments in MM Docket No. 01-317 at 50; WVRC Comments in MM Docket No. 01-317 at 35; Cumulus Comments in MM Docket No. 01-317 at 20; Eure Comments in MM Docket No. 01-317 at 5; HBC Comments in MM Docket No. 01-317 at 13, n.2; MBC Comments in MM Docket No. 01-317 at 11-12; Clear Channel Reply Comments in MM Docket No. 01-317 at n.5; MBC Reply Comments in MM Docket No. 01-317 at 4; Zimmer Comments in MM Docket No. 00-244 at 7; Weigle Comments in MM Docket No. 00-244 at 6; NAB Comments in MM Docket No. 00-244 at 29-30; Entercom Comments in MM Docket No. 00-244 at 7.

[1029] NAB Comments in MM Docket No. 01-317 at 50; MBC Reply Comments in MM Docket No. 01-317 at 4; Zimmer Comments in MM Docket No. 01-317 at 7-8; NAB Comments in MM Docket No. 00-244 at 29-30. We disagree with the commenters that support divestitures of current combinations. *See* Dick Broadcasting Comments in MM Docket No. 01-317

balance, any benefit to competition from forcing divestitures is likely to be outweighed by these countervailing considerations.

485. While commenters overwhelming support grandfathering existing combinations, many nonetheless argue that grandfathering will create competitive imbalances which favor existing group owners - those that assembled combinations under the current rules - and disfavor those that cannot assemble competing combinations because of new ownership restrictions.[1030] Like all grandfathering decisions, some disparity will exist between grandfathered owners and non-grandfathered owners. We do not believe this fact outweighs the equitable considerations that persuade us to grandfather existing combinations.

486. We expect that the issue of grandfathering existing combinations will affect predominately radio group owners because of the changes we make herein to the radio market definition. We recognize that a geographic based radio market definition may result in a fewer number of stations in certain markets. In those instances, parties may not be able to acquire the same number of stations as the largest owner in a particular market.[1031] However, those combinations were created based

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at 6-7; Idaho Wireless Comments in MM Docket No. 01-317 at 8; NABC Comments in MM Docket No. 01-317 at 17. The Commission has required divestitures of existing combinations pursuant to changes in media ownership rules in "egregious cases." *1975 Multiple Ownership Second Report and Order*, 50 F.C.C.2d at 1049.

[1030] NAB Comments in MM Docket No. 01-317 at 48; WVRC Comments in MM Docket No. 01-317 at 26; Blakeney Comments in MM Docket No. 01-317 at 2; Cox Comments in MM Docket No. 01-317 at 12; Daugherty Comments in MM Docket No. 01-317 at 4; Davis Comments in MM Docket No. 01-317 at 2; MBC Reply Comments in MM Docket No. 01-317 at 3; NABOB Reply Comments in MM Docket No. 01-317 at 8; Secret Comments in MM Docket No. 00-244 at 3; NAB Comments in MM Docket No. 00-244 at 8, 9, n.15; Brill Comments in MM Docket No. 00-244 at 1; Aurora Comments in MM Docket No. 00-244 at 27; Great Scott Reply Comments in MM Docket No. 00-244 at 2.

[1031] At the same time, however, we believe that the impact on radio owners

upon the contour-based definition that we find herein fails to adequately address our competition goals in local radio markets. To allow additional broadcasters to obtain such combinations would disserve our goals. Our decision to grandfather existing combinations simply reflects the substantial equitable considerations discussed above, considerations that we conclude outweigh our interest in improving the precision of our radio market definition in these particular cases.

487. *Transferability.* We also asked for comments on whether to allow licensees to assign or to transfer control of grandfathered combinations that violate of the new ownership rules.[1032] In general, we will prohibit the sale of existing combinations that violate the modified local radio ownership rule, the local television ownership rule, or the cross media limits.[1033] Therefore, parties must comply with the new ownership rules in place at the time a transfer of control or assignment application is filed. However, as discussed earlier, in order to help promote diversity of ownership,[1034] we will allow sales of grandfathered combinations to and by certain "eligible entities." We do not agree with commenters that advocate allowing grandfathered combinations to be freely transferable in perpetuity, irrespective of whether the

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will be mitigated because we are retaining, not decreasing, the current numerical caps, counting non-commercial stations as participants in the market, and counting any station licensed in the Arbitron market whether or not it meets Arbitron's minimum audience share requirements. In addition, a geographic based definition will allow for more regional consolidation of radio stations than our prior contour based approach.

[1032] *Definition of Radio Markets NPRM*, 15 FCC Rcd at 25081 ¶ 11; *Local Radio Ownership NPRM*, 16 FCC Rcd at 19888 ¶ 65.

[1033] Likewise, modification of the facilities of a station in a grandfathered combination will be prohibited if the proposed modification would create a new violation of the ownership rules.

[1034] *See* Policy Goals, Section III(A)(5), *supra*.

combination complies with our adopted rules.[1035] As NABC, Idaho Wireless, and ARD suggest, such an approach would hinder our efforts to promote and ensure competitive markets.[1036] Grandfathered combinations, by definition, exceed the numerical limits that we find promote the public interest as related to competition. Moreover, in the case of radio ownership, these combinations were created pursuant to a market definition that we conclude fails to adequately reflect competitive conditions. Unlike our decision not to require existing station owners to divest stations, here, the threat to competition is not outweighed by countervailing considerations. Buyers will be on notice that ownership combinations must comply at the time of the acquisition of the stations. Thus, they do not have the same expectations as present owners who acquired stations under the current ownership rules. In addition, because of the limited number of broadcast licenses available, station spin-offs that would be required upon sales of stations in a grandfathered group could afford new entrants the opportunity to enter the media marketplace. They could also give smaller station owners already in the market the opportunity to acquire more stations and take advantage of the benefits of combined operations. Because divestitures are not required until a sale of the station groups, owners have sufficient time to minimize any specific

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[1035] Cumulus Comments in MM Docket No. 00-244 at 9; Clear Channel Comments in MM Docket No. 00-244 at 5; Entercom Comments in MM Docket No. 00-244 at 7; Citadel Comments in MM Docket No. 00-244 at 12; Viacom Comments in MM Docket No. 00-244 at 8; NAB Comments in MM Docket No. 00-244 at 29; Great Scott Reply Comments in MM Docket No. 00-244 at 3; Zimmer Comments in MM Docket No. 00-244 at 7; NAB Comments in MM Docket No. 01-317 at 50; Clear Channel Comments in MM Docket No. 01-317 at 26; MBC Comments in MM Docket No. 01-317 at 12.

[1036] NABC Comments in MM Docket No. 01-317 at 17; Idaho Wireless Comments in MM Docket No. 01-317 at 7; ARD Reply Comments in MM Docket No. 00-244 at 2.

complications due to joint operations.[1037] Therefore, we reject the argument that prohibiting transfers of station groups that exceed the new ownership limits would be unacceptably disruptive or would negatively impact the availability of bank financing, as some commenters suggest.[1038] Finally, requiring future assignments and transfers to comply with our ownership rules upon sale is consistent with Commission precedent.[1039] In keeping with the policy we adopted in 1975, the prohibition on the transfer of grandfathered stations will not apply to *pro-forma* changes in ownership or to involuntary changes of ownership due to a death or legal disability of the licensee.[1040]

488. *Eligible Transfer.* We are adopting an exception to our prohibition on the transfer of grandfathered combinations in

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[1037] NAB Comments in MM Docket No. 00-244 at 9; Clear Channel Comments in MM Docket No. 00-244 at 6; Viacom Comments in MM Docket No. 00-244 at 8; NAB Comments in MM Docket No. 01-317 at 51.

[1038] NAB Comments in MM Docket No. 01-317 at 50-51; Clear Channel Comments in MM Docket No. 01-317 at 26, n.83; NAB Comments in MM Docket No. 00-244 at 9; Entercom Comments in MM Docket No. 00-244 at 8.

[1039] *See 1970 Multiple Ownership First Report and* Order, 22 F.C.C.2d at 323 ¶ 2; 1975 *Multiple Ownership Second Report and Order*, 50 F.C.C.2d at 1076 ¶ 103; *Local TV Ownership Report and Order*, 14 FCC Rcd at 12965 ¶ 146 (any transfer of permanently grandfathered television combinations after 2004 must meet the television duopoly rule or waiver policies in effect at the time of the transfer). Contrary to Clear Channel and NAB's assertions, our decision is consistent with the *1992 Radio Ownership Order*, *supra* note 96. NAB Comments in MM Docket No. 00-244 at 30; Clear Channel Comments in MM Docket No. 00-244 at 7. In the *1992 Radio Ownership Order*, we relaxed the ownership limits, permitting entities to own more stations in local markets based on numerical caps, and we also adopted an audience share cap, which precluded acquisitions of stations if the combined audience share at the time the application was filed exceeded 25%. At the time the rules went into effect, no entity owned more than the numerical caps or owned stations with a combined audience share exceeding 25%. Therefore, grandfathering existing combinations was not at issue.

[1040] *1975 Multiple Ownership Second Report and Order*, 50 FCC 2d at 1076 ¶ 103; *see also* 47 C.F.R. §§ 73.3555, note 4; 73.3540(f); 73.3541(b).

violation of the new rules. This exception applies to grandfathered radio and television combinations that exceed the ownership limits adopted in this *Order*, cross-media combinations in at-risk markets, and cross-media combinations in small to medium sized markets that exceed the ownership limits adopted in this *Order*. Entities may transfer control of or assign a grandfathered combination to "eligible entities" as defined herein.[1041] In addition, "eligible entities" may sell existing grandfathered combinations without restriction. As we define in greater detail below, we limit "eligible entities" to small business entities, which often include businesses owned by women and minorities. We believe that facilitating new entry by and growth of small businesses in the broadcast industry will further our goals of promoting diversity of ownership as well as competition and localism.[1042]

489. We define an "eligible entity" as an entity that would qualify as a small business consistent with SBA standards for its industry grouping.[1043] For example, the SBA small business size standard for radio stations is $6 million or less in annual revenue. For TV stations the limit is $12 million.[1044] In

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[1041] We are not grandfathering existing combinations of stations that exceed the ownership limits because of an attributable interest in a station pursuant to an LMA or JSA. Existing LMAs and JSAs that result in a combination of stations exceeding the ownership limits must be terminated at the time of the sale or within two years, whichever comes first.

[1042] MMTC suggests we define a category of "eligible purchasers" based on the eligibility standards set forth in S. 267 "Telecommunications Ownership Diversity Act of 2003." Because that pending legislation contemplates further definition of eligible purchasers by the Treasury Department after passage, we do not rely on its terms and therefore, set forth our criteria based on our judgment and the record of this proceeding.

[1043] *See* 13 C.F.R. § 121.201 (North American Industry Classification System (NAICS) code categories). The definition of small business for the radio industry is listed in NAICS code 515112, and the definition of a small business for the TV industry is listed in NAICS code 515120.

[1044] To determine qualifications as a small business, SBA considers the

addition, to tailor this exception to meet our public interest objectives and ensure that the benefits of this proposal flow as intended, we will further require that any transaction pursuant to this exception may not result in a new violation of the rules. Moreover, control of the eligible entity purchasing the grandfathered combination must meet one of the following control tests. The eligible entity must hold (1) 30% or more of the stock/partnership shares of the corporation/partnership, and more than 50% voting power, (2) 15% or more of the stock/partnership shares of the corporation/partnership, and more than 50% voting power, and no other person or entity controls more than 25% of the outstanding stock, or (3) if the purchasing entity is a publicly traded company, more than 50% of the voting power.

490. In addition to the above, we will allow entities that meet the definition of "eligible entity" to transfer any existing grandfathered combination generally without restriction. We believe that small businesses that qualify as eligible entities require greater flexibility than do larger entities for the disposition of assets. Restrictions on the sale of assets could disproportionately harm the financial stability of smaller firms compared to that of larger firms, which have additional revenue streams. To prevent abuse of this policy, however, an eligible entity may not transfer a grandfathered combination acquired after the adoption date of this *Order* to an entity other than another eligible entity unless it has held the combination for a minimum of three years.[1045] Also, we will prohibit eligible entities from granting options to purchase, or rights of first refusal to prevent non-eligible entities from financing an

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revenues of the parent corporation and affiliates of the parent corporation, not just the revenues of individual broadcast stations. *See* 13 C.F.R. §§ 121.103, 121.105.

[1045] We do not intend to restrict pro forma transfers of grandfathered combinations or transfer of control to heirs or legatees by will or intestacy if no new ownership violation would occur.

acquisition in exchange for an option to purchase the combination at a later date. Finally, any transaction pursuant to this policy may not result in a new violation of the rules.

491. *Radio LMA Combinations.* As we discussed in the context of attributable JSAs in the Local Radio Ownership Section, there also may be instances in which an existing LMA may affect a licensee's compliance with the ownership limits adopted herein. As we stated in instances of attributable JSAs, because we do not want to unnecessarily adversely affect current business arrangements between licensees and brokers, we will give licensees two years from the effective date of this *Order* to terminate any LMAs that result in a violation of the new ownership limits, or otherwise come into compliance with the new rules. If the licensee sells an existing combination of stations within the two year grace period, it may not sell or assign the LMA to the buyer if the LMA causes the buyer to exceed the ownership limits adopted in this *Order*. Parties are prohibited from entering into an LMA or renewing an existing LMA that would cause the broker of the station to exceed the ownership limits.

492. *TV LMA Combinations.* In our *Local TV Ownership Report and Order*, we grandfathered LMA combinations that were entered into prior to November 5, 1996, through the end of our 2004 biennial review. We do not alter this policy. These LMAs are not affected by the grandfathering policy adopted herein.

493. *TV Temporary Waivers.* A few licensees have been granted temporary waivers of our local TV ownership rule, and some have filed requests for an extension of waivers that are currently pending, or have sought permanent waivers. Any licensee with a temporary waiver, pending waiver request, or waiver extension request must, no later than 60 days after the effective date of this *Order* or the date on which the waiver expires, whichever is later, file one of the following: (i) a statement describing how ownership of the subject station

complies with the modified local TV ownership rule; or (ii) an application for transfer or assignment of license of those stations necessary to bring the applicant into compliance with the new rules.

494. *Cross-Media Conditional Waivers.* A few licensees have been granted conditional waivers of the previous one-to-a-market rule. Although we are eliminating the current radio/television cross-ownership rules, we are adopting new cross-media limits. Parties that currently have conditional waivers for radio/television combinations must submit a statement to indicate whether the combination they hold (1) is located in an at-risk market, (2) is located in a small to medium size market, and (3) is in compliance with the cross-media limits. For the combinations that comply with the cross-media limits adopted herein, we will issue a letter replacing the conditional grant with permanent approval. For any combinations that violate the cross-media limits, we will issue a letter indicating that the combination will continue to be grandfathered until a decision in the 2004 Biennial Review is final. As part of the 2004 Biennial Review, we will review and reevaluate the status of such grandfathered combinations to determine whether they should continue to be grandfathered. On a case-by-case basis, we will consider the competition, diversity, equity, and public interest factors the combinations may raise.

495. *Other Cross-Media Waivers.* Our cross-media limits are founded on the presumption that, by reason of cable carriage, television stations are available throughout the DMA to which they are assigned. We recognize, however, that this may not be true in every case. Accordingly, those requesting waiver of our cross-media limits may attempt to rebut this presumption in individual cases. For example, a television licensee assigned to a DMA to which only two other television stations are assigned (*i.e.*, an at-risk market) may request a waiver of the bar on its ownership of a daily newspaper

published within that DMA by demonstrating that the newspaper's community of publication neither receives television service from the station over-the-air nor through cable carriage.

2. Elimination of Flagging and Interim Policy

496. In August 1998, the Commission began "flagging" public notices of radio station transactions that, based on an initial analysis by the staff, proposed a level of local radio concentration that implicated the Commission's public interest concern for maintaining diversity and competition.[1046] Under this policy, the Commission flagged proposed transactions that would result in one entity controlling 50% or more of the advertising revenues in the relevant Arbitron radio market or two entities controlling 70% or more of the advertising revenues in that market.[1047] Flagged transactions were subject to a further competition analysis, the scope of which is embodied in the interim policy we adopted in the *Local Radio Ownership NPRM*.

497. We believe that the changes we make today to the market definition will address many of the market concentration concerns that led the Commission to begin flagging radio station transactions and to adopt the interim policy. By applying the numerical limits of the local radio ownership rule to a more rational market definition, we believe that, in virtually all cases, the rule will protect against excessive concentration levels in local radio markets that might otherwise threaten the public interest. To the extent an interested party believes this not to be the case, it has a statutory right to file a petition to deny a specific radio station application and present evidence that makes the necessary prima facie showing that the transaction is contrary to the public interest.[1048] Accordingly,

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[1046] *See* Broadcast Applications, Rep. No. 24303 (Aug. 12, 1998).

[1047] *See AMFM, Inc.*, 15 FCC Rcd at 16066 ¶ 7 n.10.

[1048] 47 U.S.C. § 309(d).

effective upon adoption of this *Order*, the Commission will no longer flag radio sales transactions or apply the interim policy procedures adopted in the *Local Radio Ownership NPRM* in processing them.

3. Processing of Pending and New Assignment and Transfer of Control Applications.

498. The processing guidelines below will govern pending and new commercial broadcast applications for the assignment or transfer of control of television and radio authorizations commencing as of the adoption date of this *Order*. These guidelines also cover pending and new modification applications that implicate our multiple ownership rules. Applications filed on or after the effective date of this *Order* as well as applications that are still pending as of such effective date will be processed under the new multiple ownership rules, including, where applicable, the interim methodology for defining radio markets as adopted herein. The staff is directed to issue a Public Notice containing these guidelines contemporaneously with the adoption of this *Order*.

- *New Applications*. The Commission has established a freeze on the filing of all commercial radio and television transfer of control and assignment applications that require the use of FCC Form 314 or 315 ("New Applications"). We will revise application Forms 301, 314 and 315 to reflect the new rules adopted in the *Order*. The freeze will be in effect starting with the *Order's* adoption date until notice has been published by the Commission in the *Federal Register* that OMB has approved the revised forms. Upon such publication, parties may file New Applications, but only if they demonstrate compliance with the new multiple ownership rules adopted in the *Order*, including where applicable, the interim methodology for defining

radio markets outside Arbitron metros, or submit a complete and adequate showing that a waiver of the new rules is warranted. We will continue to allow the filing of short-form (FCC Form 316) applications at any time and will process them in due course.

- *Pending Applications.* Applicants with long-form assignment or transfer of control applications (FCC Form 314 or 315) or with modification applications (FCC Form 301) that are pending as of adoption of the *Order* ("Pending Applications") may amend those Applications by submitting new multiple ownership showings to demonstrate compliance with the ownership rules adopted in the *Order*, including where applicable, the interim methodology for defining radio markets outside of Arbitron metros, or by submitting a request for waiver of the new rules.[1049] Parties may file such amendments once notice has been published by the Commission in the *Federal Register* that OMB has approved the information collection requirements contained in such amendments. Pending Applications that are still pending as of the effective date of the new rules will be processed under the new rules. Applications proposing *pro forma* assignments and transfers (FCC Form 316) will be processed in the normal course.

- *Pending Petitions and Objections.* Petitions to deny and informal objections that were submitted to the Commission prior to the adoption

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[1049] The Commission may determine that the nature of the amendment warrants a new public notice for the Pending Application.

date of the *Order* and that raise issues unrelated to competition against Pending Applications (as defined above) will be addressed with respect to those issues at the time we act on such Applications. Petitions and informal objections that were submitted to the Commission prior to the adoption date of the *Order* and that contest Pending Applications solely on grounds of competition pursuant to the interim policy[1050] will be dismissed as moot.

VII. NATIONAL OWNERSHIP RULES

499. In this section, we consider the national TV ownership rule and the dual network rule. We conclude that we should modify the former by raising the cap to 45%, and we retain the latter.

A. National TV Ownership Rule

500. The current national TV ownership rule prohibits any entity from owning televisions stations that in the aggregate reach more than 35% of the country's television households.[1051] In the *Notice*, we sought comment on whether we should retain, eliminate, or modify this rule.[1052] We asked whether the current rule is necessary in the public interest as the result of

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[1050] *See Local Radio Ownership NPRM*, 16 FCC Rcd at 19894-97 ¶¶ 84-89.

[1051] Section 73.3555(e)(1) of the Commission's rules provides that "[n]o license for a commercial TV broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer or assignment of such license would result in such party or any of its stockholders, partners, members, officers or directors, directly or indirectly, owning, operating or controlling, or having a cognizable interest in TV stations which have an aggregate national audience reach exceeding thirty-five (35) percent." 47 C.F.R. § 73.3555(e)(1). Reach is determined by the number of television households in a DMA. 47 C.F.R. § 73.3555(e)(2).

[1052] *Notice*, 17 FCC Rcd at 18543-52 ¶¶ 126-55.

competition and whether it promotes the goals of competition, diversity, and localism.[1053] We also solicited comment on whether UHF television stations should continue to be attributed with only 50% of the television households in their DMA market or whether cable and DBS carriage of UHF signals eliminates the need for this "UHF discount."[1054] We conclude that the current rule cannot be justified and we raise the cap to 45%. We retain the UHF discount.

501. In the *1984 Multiple Ownership Report and Order*, we determined that repealing the national TV ownership rule would not harm competition or diversity.[1055] Consistent with our decision in 1984, we find that restricting national station ownership is not necessary to promote either of those policy objectives. We depart, however, from our 1984 decision to repeal the rule because evidence in the record demonstrates that the national television cap serves localism. The localism rationale for retaining the national television cap was articulated in our *1998 Biennial Review Report*. In that decision we explained that preserving a balance of power between the networks and their affiliates serves local needs and interests by ensuring that affiliates can play a meaningful role in selecting programming suitable for their communities.[1056] We continue to believe that to be the case and, consequently, that a national cap is necessary to limit the percentage of television households that a broadcast network may reach

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[1053] *Id.* at 18544 ¶ 129.

[1054] *Id.* at 18544 ¶¶ 130-31. *See* 47 C.F.R. § 73.3555(e)(2)(i).

[1055] *1984 Multiple Ownership Report and Order*, 100 F.C.C.2d at 46, 50-56 ¶¶ 86, 97-114 (repealing the station ownership restriction and instituting a six-year transitional ownership limitation of 12 stations). The Commission subsequently reversed its decision to repeal the rule. *1985 Multiple Ownership MO&O*, 100 F.C.C.2d at 88-92 ¶¶ 33-40 (eliminating the sunset provision and adding a 25% cap on national audience reach, calculated as a percentage of all Arbitron ADI television households).

[1056] *1998 Biennial Review Report*, 15 FCC Rcd at 11074-75 ¶30.

through the stations it owns. Although the record supports retention of a national ownership cap, it does not support a cap of 35%. The evidence before us shows that the cap at the current level is not necessary to preserve the balance of bargaining power between networks and affiliates. The record also indicates that the cap appears to have other drawbacks. Most importantly, the cap restrains some of the largest group owners – broadcast networks – from serving additional communities with local news and public affairs programming that is of greater quantity and at least equal, if not superior, quality than that of affiliates. Moreover, we believe that a modest relaxation of the cap will help networks compete more effectively with cable and DBS operators and will promote free, over-the-air television by deterring migration of expensive programming to cable networks. Balancing these competing interests, we raise the national cap from 35% to 45%.

1. Background

502. Since 1941, the Commission has limited the national ownership reach of television broadcast stations.[1057] The Commission has modified the restriction several times to keep pace with the changing marketplace.[1058] In 1984, the Commission repealed the rule, concluding that it was not necessary to promote competition or diversity, and instituted a six-year transitional ownership limit of twelve television stations nationwide.[1059] On reconsideration, the Commission affirmed its underlying conclusions, but it eliminated the sunset

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[1057] *Notice*, 17 FCC Rcd at 18543 ¶ 127.

[1058] *See Broadcast Services Other Than Standard Broadcast*, 6 Fed. Reg. 2282, 2284-85 (May 6, 1941) (imposing a national ownership limit of three television stations); *Rules Governing Broadcast Services Other Than Standard Broadcast*, 9 Fed. Reg. 5442 (May 23, 1944) (raising the ownership limit from three to five stations); *Amendment of Multiple Ownership Rules*, 43 F.C.C. 2797, 2801-02 ¶ 14 (1954) (raising the ownership limit from five to seven stations).

[1059] *1984 Multiple Ownership Report and Order*, 100 F.C.C.2d at 46, 54-56 ¶¶ 86, 108-114.

provision out of a concern that repealing the rule would create a disruptive restructuring of the national broadcasting industry.[1060] The Commission retained the twelve station limit and, in addition, prohibited an entity from reaching more than 25% of the country's television households through the stations it owned.[1061]

503. In 1996, the Commission adopted the current 35% cap in response to the Congress' directive to raise the cap (from 25% to 35%) and to eliminate the rule that an entity could not own more than twelve stations nationwide.[1062] The Commission subsequently affirmed the 35% cap as part of its 1998 biennial review of media ownership regulations.[1063] In affirming the cap, the Commission reasoned that it would be premature to institute revisions to the national TV ownership limit before fully observing the effects of changes to the local TV ownership rules and the effects of raising the cap from 25% to 35%.[1064] The Commission also concluded that the national TV ownership rule helps promote better service to local communities by preserving the power of affiliates to negotiate with the networks and to make independent programming decisions.[1065] In addition, the Commission concluded that the national TV ownership rule facilitates competition in the program production market and in the national advertising market.[1066]

[1060] *1985 Multiple Ownership MO&O*, 100 F.C.C.2d at 88-92, 97 ¶¶ 33-40, 52.

[1061] *Id.*

[1062] *Implementation of Sections 202(c)(1) and 202(e) of the Telecommunications Act of 1996 (National Broadcast Television Ownership and Dual Network Operations)*, 11 FCC Rcd 12374 (1996).

[1063] *1998 Biennial Review Report*, 15 FCC Rcd at 11072-75 ¶¶ 25-30.

[1064] *Id.* at 11072-74 ¶¶ 25-29.

[1065] *Id.* at 11074-75 ¶ 30.

[1066] *Id.* at 11073 ¶ 26 n.78.

504. Several broadcast networks challenged the Commission's decision to retain the national TV ownership rule. In *Fox Television Stations, Inc. v. FCC*, the U.S. Court of Appeals for the District of Columbia Circuit found that the Commission's 1998 decision to retain the rule was arbitrary and capricious, and it remanded the rule for further consideration.[1067] The court rejected the Commission's "wait-and-see" approach on the grounds that it was inconsistent with the Commission's statutory mandate to determine on a biennial basis whether its rules are necessary in the public interest.[1068] The court also held that the Commission failed to demonstrate that the national cap advanced competition, diversity, or localism.

505. With respect to competition, in its *1998 Biennial Review Report*, the Commission provided a study and a table showing that large group owners of television stations had acquired additional stations and increased their audience reach since the 1996 Act's passage.[1069] The court was not persuaded by the Commission's evidence that large group owners have undue market power, and it agreed with the networks that the figures alone, absent evidence of an adverse effect on the market, were insufficient to support retention of the rule.[1070] The court also found unsupported the Commission's statement in the *1998 Biennial Review Report* that the national cap is necessary to safeguard competition in the national advertising or program production markets.[1071] The court concluded that the Commission's analysis of the state of competition in the television industry was incomplete and did not satisfy the

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[1067] 280 F.3d 1027.

[1068] *Id.* at 1042.

[1069] *Id.* at 1041-42 (citing *1998 Biennial Review Report*, 15 FCC Rcd at 11073 ¶ 27).

[1070] *Id.* at 1042.

[1071] *Id.* (citing *1998 Biennial Review Report*, 15 FCC Rcd at 11073 ¶ 26 n.78).

requirement under Section 202(h) to show that the rule is necessary in the public interest as the result of competition.[1072]

506. The court held that diversity and localism are valid public interest goals within the context of broadcast regulation and made it clear that the Commission could determine that the national TV ownership rule was necessary in the public interest under Section 202(h) if it served either interest.[1073] The court, however, ruled that the Commission had not provided sufficient evidence that either one of these goals was served.[1074] The court noted that the Commission, in its *1998 Biennial Review Report*, "mentioned national diversity as a justification for retaining the [national TV ownership rule], but did not elaborate upon the point."[1075] The court found the Commission's statement did not explain why the rule is necessary to further national diversity. The court also found that the Commission failed to justify its departure in the 1998 decision from its 1984 decision, in which the Commission concluded that the national TV ownership restriction should be phased out after six years because: (1) the rule no longer was necessary for national diversity given the abundance of media outlets and (2) a national rule was irrelevant to local diversity.[1076] In addition, the court held that the Commission did not adequately demonstrate that the rule strengthens the bargaining power of independently-owned affiliates and thereby promotes program diversity, particularly in light of its 1984 conclusion that no evidence suggested that stations that are not group-owned responded better to community needs or

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[1072] *Id.* at 1044.

[1073] *Id.* at 1042.

[1074] *Id.* at 1042-43.

[1075] *Id.* at 1042 (citing *1998 Biennial Review Report*, 15 FCC Rcd at 11073 ¶ 26 n.78).

[1076] *Id.* at 1034, 1042-45. *See 1984 Multiple Ownership Report and Order*, 100 F.C.C.2d at 27, 30-31, 37 ¶¶ 31-33, 43, 60.

spent proportionately more revenue on local programming.[1077] However, the court acknowledged the Commission's right to reverse course, provided the reversal is supported by a reasoned analysis.[1078] Recognizing that sufficient evidence may exist to justify the national TV ownership rule, the court determined that the appropriate remedy was to remand, rather than to vacate, the rule.[1079] We now consider whether the current rule can be justified as necessary to promote competition, diversity or localism.

2. The Current National TV Ownership Rule Cannot Be Justified

507. Under Section 202(h), we must evaluate whether the national TV ownership rule continues to be "necessary in the public interest as the result of competition."[1080] To make this determination, we consider whether the rule serves the public interest by furthering our policy goals of competition, localism, or diversity. The evidence demonstrates that a national TV ownership limit is necessary to promote localism by preserving the bargaining power of affiliates and ensuring their ability to select programming responsive to tastes and needs of their local communities. However, the evidence also demonstrates that the current cap of 35% is not necessary to preserve that balance.

a. Competition

508. In analyzing whether the current rule is necessary to protect competition, we focus on whether and to what extent market power exists in any relevant market, and what effect the rule has on the existence and exercise of this market power. In the 1984 decision to eliminate the national ownership cap, the

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[1077] *Fox Television*, 280 F.3d at 1043 (citing *1984 Multiple Ownership Report and Order*, 100 F.C.C.2d at 35 ¶ 53).

[1078] *Id.* at 1044-45.

[1079] *Id.* at 1048-49.

[1080] 1996 Act, § 202(h).

Commission limited its competition analysis to the national television advertising market.[1081] In this decision, we expand our competition review to include the national program acquisition market. The national cap affects economic concentration in national markets by limiting the size of group owners of television stations, but does not affect concentration in the local video delivery market, and thus does not raise competition concerns that were discussed in the local ownership rule sections above. The national cap limits the ability of group owners to purchase television stations in individual local markets. The effect of this ownership restriction on station performance in the video delivery market is discussed in the localism section below.

509. Based on our analysis of the relevant markets, we find that the current rule is not necessary to maintain competition in the three economic markets we examine. As the record before us indicates, the media marketplace is undergoing unprecedented change. Broadcast stations are subject to competition from cable and DBS,[1082] and they face increased competition for viewers, advertising revenues, station network affiliations, and programming.[1083] We conclude that the 35% cap is no longer necessary to protect competition in the media marketplace and unnecessarily constrains the organization of, and investment in, free, over-the-air (*i.e.*, non-subscription) broadcast television.

510. *Broadcast competition framework.* The evolution of non-price competition in television has implications for the economic organization of broadcast television networks. Higher channel capacity cable systems and the growth in the

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[1081] *1984 Multiple Ownership Report and Order*, 100 F.C.C.2d at 39-40 ¶¶ 67-71.

[1082] *See* Modern Media Marketplace, *supra* Section IV.

[1083] Paxson notes that broadcasters face competition today from "a dizzying array of diverse and high quality entertainment and news choices." Paxson Comments at 11.

number of cable networks, together with the programming options offered by DBS, have intensified the competitive pressure on broadcast television networks to slow the erosion of viewer market share and to build strong network brand identity reflecting program focus, quality and reputation.[1084]

511. Two broadcast television network organizational changes, which are viewed as responses to the growth in viewer options, are noteworthy, namely, (1) the extensive backward integration into program supply, and (2) the desire to increase the extent of forward vertical integration through ownership of additional local television stations. Transaction cost economics suggests that such organizational integration induced by increased rivalry within the media industry may improve economic efficiency.

512. Transaction cost economics adopts a contractual approach in understanding the economic organization of firms.[1085] The transaction—the exchange of goods or services for money or other goods between parties—is the focal point of economic analysis. Determining the governance structure that minimizes the economic cost of effectuating a particular type of transaction is a central objective of a transaction cost analysis. Transaction cost economics identifies three, discrete governance structures, namely, (1) the market; (2) hybrid contracting; and (3) hierarchy, where transactions are placed under unified ownership in a firm subject to administrative controls and management.[1086] Whether it is economically

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[1084] Reputation may constitute a mobility barrier that helps deflect continuing market share erosion in the mass audience strategic group. An empirical study of the relationship between reputation and strategic groups in the insurance industry is provided by T. D. Ferguson, D. L. Deephouse, and W. L. Ferguson, *Do Strategic Groups Differ in Reputation?*, 21 STRATEGIC MGMT J. 1195, 1195-1214 (2000).

[1085] Oliver E. Williamson, THE MECHANISMS OF GOVERNANCE 54 (Oxford Univ. Press 1999).

[1086] *Id.* at 378.

efficient (cost minimizing) to effectuate exchange using market contracting or through hierarchy (vertical integration) depends on certain behavioral assumptions, and key attributes of any given transaction.[1087]

513. In general, ordinary market contracting is an efficient governance structure for transactions supported by general purpose assets not dedicated to the specific output demand of a given customer. As asset specificity deepens, market contracting as a governance structure gives way to either hybrid structures or hierarchy (vertical integration) as the least costly to organize transactions.[1088] The pervasiveness of asset

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[1087] From a transaction cost perspective, transactions differ one from another in three important dimensions, namely, (1) the frequency of a given type of transaction; (2) the degree and type of uncertainty implied by the transaction; and (3) the condition of asset specificity. While all three dimensions are important in determining the least costly governance structure for organizing transactions, the condition of asset specificity is especially important. Asset specificity refers to the degree that an asset can be redeployed to alternative uses and by alternative users without a substantial loss in productive value. Asset specificity is similar to the concept of *sunk cost* as found in the literature on the theory of contestable markets and recent game-theoretic models of industry structure and performance. Asset specificity is a somewhat broader concept than sunk cost, however, and its full significance is apparent only within the context of incomplete contracting. Transaction cost economics recognize that asset specificity can take many different forms including, but not limited to, site specificity; physical asset specificity; human asset specificity derived from learning-by-doing; and dedicated assets, representing discrete investments in general purpose plant or facilities for meeting the demand for output for a specific customer. *See* Williamson, *supra* note 1088 at 50.

[1088] The condition of asset specificity, if pervasive, poses substantial contracting hazards such that ordinary market exchange as encountered in competitive markets may be impaired or even effectively blocked. In other words, the transaction cost of operating a market mechanism as a governance structure in the presence of deep asset specificity may be so high that a market will simply fail. Thus, market failure may be attributable not only to various externalities but to excessive transaction costs as well. This insight is attributed to Kenneth Arrow, according to Williamson. *See* Oliver E. Williamson, THE ECONOMIC INSTITUTIONS OF CAPITALISM 19 n.8 (1985).

specificity in the program production industry suggests that complex contracts between broadcast television networks and program suppliers may not be the least costly governance structure for effectuating transactions.

514. Broadcast television networks have a single, strategic focus, namely, the maximization of the number of television viewers that are attracted to mass audience and niche audience programming.[1089] This strategic focus is crucial to broadcast television networks, since the sale of audiences to national advertisers provides their only stream of revenue from broadcast operations in contrast to cable networks which may receive both advertiser and subscriber revenue.[1090] By contrast, local broadcast television stations pursue a more complex business strategy as licensed broadcast facilities. First, the local station seeks to maximize the size of its audience it attracts within its local television market. If the local station is a network affiliate, then the local station will promote the network's program schedule together with syndicated programming the station may acquire to help fill out its daily program schedule. Second, the local station will also promote its own locally-produced programming, such as news and public affairs programming, that it believes is responsive to issues or viewer preferences in the communities served by the station. Station management may vary the allocation of time

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[1089] Roughly speaking, broadcast television revenues tend to be proportional to audience size. Assuming that marginal operating cost is small relative to the fixed cost of operating a broadcast television network and generally invariant with respect to changes in audience size, then maximizing audience size is roughly equivalent to maximizing profit.

[1090] In most cases, broadcast television networks today are organizational units of larger media enterprises, *e.g.*, ABC is one of numerous business units operated by the Disney corporation, that have numerous revenue streams. Corporate management ordinarily expects, however, that each business unit will recover its unit-specific fixed and variable costs, contribute to the cost of shared corporate services and functions, and earn unit-specific profit.

devoted to any particular type of programming, including network programming, to respond to emerging preferences or news events in the communities located in its local television market.

515. As the networks have lost viewer market share over the last decade in response to the growth in cable and DBS, the traditional contractual relationship between a television network and a local station affiliate may be a less efficient governance structure. From a transaction cost perspective, television networks view their massive sunk investments in network programming as increasingly risky assets as non-broadcast program options proliferate.

516. With respect to contractual safeguards, the networks have attempted to negotiate substantial penalties for failure to clear a full schedule of network programming. With respect to changes in governance structure, the broadcast television networks have argued for elimination of the national ownership cap, which would permit the networks to substitute hierarchy (vertical integration) for the current contractual relationship with independently-owned station affiliates. Presumably, the networks believe, consistent with transaction cost logic, that conflicts in strategic focus between stations and the network respecting programming decisions can be resolved more efficiently, *i.e.*, at minimal transaction cost, if hierarchy, *i.e.*, forward vertical integration, replaces market contracting as the governance structure.

517. Thus, our transaction cost analysis suggests that our national ownership cap probably restricts the full transition to the least costly way for organizing transactions between television networks and local television stations, *i.e.*, forward vertical integration, *assuming* that realization of a network's singular strategic focus on mass or niche audience size is the preferred policy objective. If, however, locally produced programming and ultimate program selection authority are a higher policy priority, then our transaction cost economic

framework identifies the relevant policy trade-off, namely, the incremental social benefit of local programming viewed as a component of our localism policy goal versus the increased social and private costs of inefficient contracting.

518. *Program Production and Acquisition Market.* Competition in the program production and acquisition market is important because networks and owners of individual television stations compete with each other, as well as with cable television networks, to acquire programming that will continue to attract viewers to their channels. Although television station owners as a group are relatively significant purchasers of programming, we have no evidence that they exercise market power in the program production market.[1091]

519. In considering the effect of the national television cap on competition in the program acquisition market, we first must identify the market participants. The broadcast networks contend that the following categories of firms compete in the program acquisition market: broadcast television networks, individual television stations (and group owners thereof), non-broadcast program networks (*i.e.* cable networks), syndicators, pay-per-view systems, VHS and DVD rental stores.[1092] NASA counters that major broadcast networks are a discrete sub-market, or "strategic group," within the program purchasing market.[1093] We generally agree with the networks' definition of the relevant market participants, although we exclude video sales and rental stores. We disagree with the networks' contention that such outlets are clearly a substitute for the delivered video programming of broadcast channels and cable channels. Those channels are the most conventional form of television viewing that can be substituted among by viewers

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[1091] *See* Miscellaneous Requests, Independent Producers *infra* Section VIII(D).

[1092] Fox Comments, Economic Study E.

[1093] NAB/NASA Reply Comments at 57.

almost instantly. It is possible to analyze the impact on the program acquisition market of relaxing the national television ownership cap by examining company expenditure shares. The following describes estimates of expenditure shares and calculation of a hypothetical HHI. The analysis assumes that the buyers in this market are broadcast networks, broadcast stations, and cable networks.[1094] OPP Working Paper 37 (Table 32) provides estimates for the year 2000 of programming expenditures by the Big Four commercial networks and by television stations.[1095]

520. The table below provides program expenditure data for the year 2000 for the Big Four broadcast networks in column 2 and for eight firms that own cable networks in column 4. The eight firms include the top four broadcast networks, the two biggest cable network owners that do not own television stations, and the two companies with the biggest cable network shares that also own television stations. There is also a residual category that includes all other cable network expenditures as "Other."

521. Column 3 includes some hypothetical broadcast station owner shares. We do not know exactly how station

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[1094] Our market definition includes pay cable networks as well as pay-per-view networks, but in the absence of data, they are excluded from this analysis.

[1095] The network figure is based on gross advertising revenue data from the Television Bureau of Advertising, FCC data on net advertising as a percentage of gross, and a trade press estimate of network programming expenditures as a percentage of net advertising revenues. This yields a total figure for the top four networks rather than estimates for each network. This analysis assumes that the networks each spend the same amount, which we believe is a reasonable approximation although Fox probably spends less than the other three. The television station estimate is based on data in the NAB Television Financial Report. The cable programming network figures come from Kagan World Media publications, ECONOMICS OF BASIC CABLE NETWORKS (2002) at 432-433 and CABLE PROGRAM INVESTOR (Jan. 17, 2003) at 6. Data are available for 65 basic cable networks and for the HBO, Showtime, and Starz premium channels.

expenditures are divided up among companies that own television stations. The numbers in this column represent a "worst case scenario" of what could happen if the national television cap were eliminated. In 2000 there were 1248 commercial television stations on the air. We know that the major commercial networks each reach virtually 100% of US television households and that each network has roughly 200 affiliated stations.[1096] If stations were distributed evenly across markets, then there would be room for six television station companies each reaching all US television households.

522. However, stations are not evenly distributed across markets. There are 50 Nielsen DMAs with fewer than four commercial stations, but they account for only 4.6% of US television households, so, from the point of view of station programming expenditures, it is reasonable to assume that each of the top four broadcast networks could achieve 100% coverage of US television households. However, there are 120 markets with fewer than six commercial television stations, and those markets account for 19.7% of US television households. So it is reasonable to assume that two additional station groups could grow to 80% coverage. This analysis assumes that television station program expenditures are divided among six firms: the four networks with 100% coverage, and Cox and Hearst, each with 80% coverage. We assume that expenditures are proportionate to coverage. The resulting expenditure estimates are in column 3. These estimates reflect a level of concentration that is higher than the true level. There are 63 markets with more than six commercial stations in them. Adding up the excess over six stations in each market yields a total of 259 stations. We know that a single company can own multiple stations in the same market, but it is likely that even with more companies owning two stations in a market that there will still be more than six station owners in some markets.

[1096] There are 210 Nielsen DMA markets, and in a few cases a network has more than one affiliate per market.

523. Column 5 contains hypothetical total programming expenditures for the eight firms, aggregating across broadcast network, broadcast station, and cable network categories, and using the hypothetical consolidated television station ownership pattern described above. Column 6 shows market shares and column 7 implements the HHI calculation by squaring and summing the market shares. The resulting "worst case" HHI of 1535 is in the moderately concentrated range. Even with the highly unrealistic assumption of a 100% national reach by four companies, and an 80% reach by two companies, these levels of market share provide us with no basis to conclude that the current 35% cap on national television ownership is needed to protect competition in the program acquisition market.

Hypothetical HHI for Program Acquisition (data are year 2000 in millions of $)

	Broadcast Network	Broadcast Station	Cable Network	Total	Market Share	Market Share Squared
Cox	0	969.5	139.4	1108.9	4.37	19.13502
Hearst	0	969.5	530	1499.5	5.92	34.98944
ABC	2581.75	1212	1276.7	5070.45	20.00	400.071
Fox	2581.75	1212	521.8	4315.55	17.02	289.812
GE	2581.75	1212	300	4093.75	16.15	260.7875
Viacom	2581.75	1212	1466.4	5260.15	20.75	430.5666
Time Warner	0	0	2162.9	2162.9	8.53	72.79758
Liberty Media	0	0	786.3	786.3	3.10	9.621009
Other	0	0	1052.5	1052.5	4.15	17.23806
Total	10327	6787	8236	25350	100.00	1535.018

524. *National Advertising Market.* The Commission's focus is not on advertisers, but on the ability of broadcasters to compete for advertising revenues. Broadcast networks compete for advertising dollars by creating national audiences for their programming. If the networks cannot generate national

audiences, their ability to compete for advertising revenues will decline, thereby diminishing their ability to invest in innovative programming. As a result, viewers will experience a decrease in programming choices and quality.

525. In its 1984 decision, the Commission determined that elimination of the national cap would not harm competition in the national advertising market.[1097] The Commission found that the number of firms in the market would ensure continued vigorous competition in that market. In the *Notice*, we sought information on whether our conclusion in 1984 continues to be valid. To analyze competition in this market, we sought comment on the firms that compete in the national television advertising market, including the extent to which national spot advertisements and/or syndicated programming are fungible with network television advertising from the perspective of advertisers.[1098] The national television advertising market brings together those advertisers wishing to reach a national audience with television networks that provide national exposure. Broadcast television networks are the leading suppliers of national television advertising.

526. NAB/NASA claims the record demonstrates that national spot advertising is competitive with national advertising.[1099] National advertisers can purchase advertising on a collection of local television stations that can approximate

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[1097] *1984 Multiple Ownership Report and Order*, 100 F.C.C.2d at 52 ¶102.

[1098] National spot advertising time is sold by stations to national advertisers, which aggregate national or regional coverage by purchasing advertising spots from stations in multiple markets. Syndication refers to advertisements sold in syndicated programs. *See* OPP Working Paper 37 at 11.

[1099] *See* B.D. McCullough & Tracy Waldon, *The Substitutability of Network and National Spot Television Advertising*, 37 Q. J. BUS. & ECON 3 (Spring 1998) (*"Network Substitutability"*) (concluding that the estimated elasticities suggest that the network and national spot advertisements have been, and continue to be, good substitutes in the aggregate). *But see* Silk, Klein, and Berndt, *supra* note 522 at 323-48 (eight national media classes are not viewed as substitutes by national advertisers).

a national advertisement on a single network. Local television stations sell national spot advertising through advertising agencies, which aggregate the available advertising on local stations for national spot buyers. NAB/NASA contends that when demand for national advertising on a particular network show exceeds the available supply of national network advertising time, advertisers turn to the national spot advertising market to reach viewers.[1100] Television stations rely in part on the national spot advertising market for a portion of their advertising revenue. NAB/NASA argues that if the ownership cap is raised, the broadcast networks will increase their ownership of television stations and decrease the national spot availabilities to such an extent that the viability of the national spot market will be impaired.[1101] Specifically, NAB/NASA contends that a network-owned station will not compete against its network for national (spot) advertising revenue. The result, according to NAB/NASA, is that competition in the national advertising market will be diminished by the decreased viability of national spot advertising as a substitute for network advertising. NAB/NASA asserts that the resulting loss of revenue to local stations will harm their ability to compete with other delivered video providers.[1102]

527. *Discussion.* We agree that a strong national spot advertisement market is an important component of the financial stability and competitiveness of television station owners. We find, however, that the increase in the cap from 25% to 35% has not harmed national spot advertising revenues. Our analysis of advertising revenue data indicates that despite increases in ownership of stations by CBS, NBC and Fox since 1996, there has been no diminution in the national spot advertising market that can be reliably associated with an

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[1100] NAB/NASA Comments at 59.

[1101] *Id.* at 61-62.

[1102] *Id.*

increase in network station ownership. With the exception of 2001, national spot advertising has experienced a relatively consistent growth.[1103]

528. Although we agree with NAB/NASA that network-owned stations have less incentive to compete directly with an affiliated broadcast network in the national advertising markets, we cannot agree that such competition in fact would not occur. If national advertisers are willing to pay a higher per-spot price to network-owned stations than are local advertisers, network-owned stations might well accept the higher priced advertising. Thus, the profit-maximizing behavior of the network-owned stations might well serve as a substitute for national advertisers seeking to purchase national spot advertising. Such a response by network-owned stations would maintain the viability of national spot advertising as an option for national advertising regardless of the level of the national television cap. Moreover, even if the top four networks were to acquire additional local stations and declined to use the national spot advertising availabilities to compete with their own network's advertising availabilities, there is every reason to think the network-owned stations would seek to take national advertising dollars away from *other* broadcast networks. That is, even if an NBC-owned station sought not to compete with the NBC network for advertising dollars, the NBC-owned stations have incentives to compete in the national spot market for advertising dollars that might otherwise go to the CBS, ABC, and Fox networks. Consequently, we cannot say that the national cap is necessary to protect competition in the national advertising market.

[1103] Since 1996, the broadcast networks have increased the number of owned and operated stations, yet the national spot advertising volume has risen from $9.1 billion in 1995 to $12.2 billion in 2000. From 1990-1994, the compound annual growth rate (CAGR) in the national spot advertising market was approximately 4.9% as compared to the CAGR for 1995-2000 of approximately 6.1%. *See* OPP Working Paper 37 at 13. *See also* Richard Billotti, *The Case for Moderate Growth in TV Advertising*, EQUITY RESEARCH (Jan. 3, 2003).

529. *Innovation.* In the *Notice*, we asked whether the national ownership cap promotes or hinders innovation in the media marketplace.[1104] Affiliates argue that non-network owners encourage innovation because affiliates provide a competitive outlet for innovative programming. NAB/NASA provides nine examples of innovation by non-network group owners, such as satellite newsgathering encouraged by affiliates to improve upon network-delivered news; the development of the local newsmagazine format; all-news cable channels developed for cable carriage; digital TV experiments such as the multicasting by several affiliates of the NCAA tournament; the delivery of local news in HDTV format; and the creation of iBlast, a joint venture between affiliates and an outside firm to develop new uses for digital spectrum.[1105]

530. Taking an opposing view, Fox contends that the cap limits networks' investment in innovative programming by "inhibiting economic efficiencies" that come with a larger number of owned and operated stations. As evidence, Fox refers to a study by Michael Katz which concluded that, by inhibiting the potential economic efficiencies available to group owners, the rule artificially raises the cost of operating television stations and limits the return that group owners can realize on their programming investments.[1106] Katz argues that the rule drives group owners to direct more of their resources away from free television and toward alternative means of distributing programming content, such as subscription-based cable channels.[1107]

531. *Discussion.* The current national ownership cap appears to encourage innovation in broadcast television by preserving a number of separately-owned station groups, including non-

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[1104] *Notice*, 17 FCC Rcd at 18549-50 ¶ 146.

[1105] *See* NAB/NASA Reply Comments at 23-27.

[1106] Fox Comments at 43; Katz, *supra* note 66.

[1107] Katz, *supra* note 66 at 48-51.

network owned station groups. The current number of station group owners has led to innovation in ways that benefit the public. Those developments include the creation of local all-news channels in partnership with local cable companies, the implementation of program formats such as local newsmagazines, and, importantly, experimentation with the spectrum allocated to local broadcasters for digital television.[1108]

532. The transition to digital television represents a critical evolutionary step in broadcast television. We are committed to ensuring the rapid completion of that transition in a way that delivers the greatest possible benefits to the viewing public. We believe that the broadcast industry is more likely to rapidly address the technical and marketplace issues associated with digital television if there are a variety of group owners exploring ways to use the spectrum. The record shows that non-network owners of television stations are actively exploring different ways of using digital spectrum. It is also important to have group owners with potentially different economic incentives in this area examining transition mechanisms to digital television. Because of networks' ongoing investment in programming, it is possible that networks may have incentives to use digital spectrum differently from affiliates. The Fox television network, for instance, has indicated its interest in using the spectrum of its owned stations as well as its affiliates for future services.[1109] Therefore, we conclude that a national television cap is necessary to preserve a number of separately-owned television station groups, including non-network groups, that will increase the types of digital transition experiments and ultimately facilitate a rapid and efficient transition to digital broadcast television.

[1108] NAB/NASA Reply Comments at 57-58.

[1109] NAB/NASA Comments at 42.

b. Diversity

533. The *1984 Multiple Ownership Report and Order* concluded that the local community is the relevant market for evaluating viewpoint diversity and that, therefore, the national TV ownership rule is not needed to promote viewpoint diversity.[1110] The *1984 Multiple Ownership Report and Order* also stated that the national market is not relevant for evaluating viewpoint diversity, but even if it were, the proliferation of media outlets renders the national ownership restrictions unnecessary.[1111] In the *1998 Biennial Review Report*, the Commission did not analyze the rule's effects on viewpoint diversity and merely stated, without evidentiary support, that the rule promotes diversity of programming.[1112] In remanding the national TV ownership rule, the court in *Fox Television* found that the Commission had failed to support its 1998 conclusion that the rule is necessary to strengthen affiliates' bargaining power and had neglected to address its 1984 determination that the national market is not the relevant geographic area to consider when evaluating diversity.[1113] We address the issue of affiliates' bargaining power in the following section and address diversity here.

534. In the *Notice*, we observed that the national TV ownership rule does not appear to be relevant to the goal of promoting viewpoint diversity because people gather news and information from sources available in their local market and that the relevant geographic market for viewpoint sources is local, not national.[1114] We also noted that the viewpoints aired by television stations in one city do not seem to have a

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[1110] *1984 Multiple Ownership Report and Order*, 100 F.C.C.2d at 27 ¶¶ 31-32.

[1111] *Id.* at 27-31 ¶¶ 33-43.

[1112] *1998 Biennial Review Report*, 15 FCC Rcd at 11075 ¶ 30.

[1113] *Fox Television*, 280 F.3d at 1042-43.

[1114] *Notice*, 17 FCC Rcd at 18546 ¶136.

meaningful impact on the viewpoints available in other cities.[1115] Commenters do not provide evidence that persuades us to alter those views, and we affirm our 1984 conclusion that the national TV ownership rule is not necessary to promote diversity.

535. *Discussion.* We conclude that the national television cap is not necessary to promote viewpoint diversity. Americans use media outlets available in their local communities as sources of information. The national television cap, by contrast, ensures a larger total number of station owners *nationwide*, but it has no meaningful impact on viewpoint diversity within local markets.[1116] Therefore, we affirm our 1984 decision that the national television ownership limit is not necessary to promote viewpoint diversity.[1117] We also affirm our decision that the market for viewpoint diversity is local, not national. And we reiterate our 1984 statement that even if the national market were the relevant area to consider, the proliferation of media outlets nationwide renders the current rule unnecessary.[1118]

[1115] *Id.*

[1116] It is possible, of course, that the replacement of one station owner by another could in fact reduce the number of independently-owned television stations in that market. If the acquiring firm already owned one station in that market and the seller was selling its only station in that market, there would be one less independently-owned station in that market. The impact of such a transaction on viewpoint diversity would be accounted for under the diversity component of our local rules.

[1117] *See* Fox Comments at 34-35. We are not persuaded by claims to the contrary. *See* UCC Comments at 49-50, 53-54; Cox Comments at 65; IPI Comments at 63; AFTRA Comments at ¶ 123; CCC Comments at 22.

[1118] *1984 Multiple Ownership Report and Order*, 100 F.C.C.2d at 25, 27 ¶¶ 24, 33. *See also* Modern Media Marketplace, *supra* Section IV; Fox Comments at 10-26; Paxson Comments at 9-11; Letter from John C. Quale, Counsel for Fox, to Marlene Dortch, Secretary, FCC (May 2, 2003) ("Fox May 2, 2003 Ex Parte"), Attachment A at 18. *But see* Cox Reply Comments at 18-22 (growth of other media outlets does not negate the need for the 35% cap).

536. Although proponents of the current rule assert that the increased uniformity imposed by the networks' national distribution agenda limits the number of viewpoints available to the public,[1119] we do not find convincing evidence in the record indicating that raising the current national TV ownership limit would harm viewpoint diversity. Professors Schwartz and Vincent assert that maintaining a diversity of ownership across local markets is beneficial because viewers may become aware of investigative news stories presented by stations in other markets, particularly those of strong stations.[1120] NAB/NASA argues that "this type of cross-fertilization is less likely to occur in the absence of the national TV ownership rule."[1121] For this cross-fertilization to be a plausible scenario, the following minimum conditions must occur: (1) the national cap prevents a station from being acquired by a broadcast network; (2) the non-acquired station produces content that by some measure is meaningfully different (and significant from a viewpoint perspective) from what the network-owned station would have aired; and (3) the airing of that different content becomes known to consumers in other localities. The national cap cannot be justified by reference to such a hypothetical scenario as this.

537. Commenters discussing types of diversity other than viewpoint diversity do not provide an evidentiary basis for retaining the current cap.[1122] The *1998 Biennial Review Report*

[1119] NAB/NASA Comments at 12; NAB/NASA Reply Comments at 6; Cox Comments at 26-31.

[1120] NAB/NASA Comments, Attachment 1, Marius Schwartz & Daniel R. Vincent, *The Television National Ownership Cap and Localism* ("NAB/NASA Comments, Schwartz/Vincent Paper") at 12-13. *See also* NAB/NASA Comments at 12, 69-70; Cox Reply Comments at 12-13.

[1121] NAB/NASA Comments at 69.

[1122] Cox briefly discusses program, source and outlet diversity, but it does not provide evidentiary support for its arguments. Cox Comments at 65-66. CPD fails to explain how repealing the 35% cap would diminish program and source diversity in prime time programming. *See* CPD Comments at 3-

stated that "[i]ndependent ownership of stations also increases the diversity of programming by providing an outlet for non-network programming."[1123] In this *Report and Order*, however, we have concluded that we can and should rely on the marketplace, rather than regulation, to foster program diversity.[1124] Further, the record in this proceeding does not contain evidence that affiliates air programming that is more diverse than programming aired by network-owned stations. Therefore, we cannot affirm our earlier determination regarding program diversity, and we do not find that the cap is necessary to foster program diversity.

c. Localism

538. *Introduction.* The Commission's decision in the *1984 Multiple Ownership Report and Order* did not address whether the national TV ownership rule advances its goal of localism.[1125] In the *1998 Biennial Review Report*, however, the Commission did address its localism goal, declining to modify the national TV ownership restriction in part because affiliates "play a valuable counterbalancing role" to network programming decisions by exercising their independent programming discretion regarding what programs best serve the needs and interests of their local communities.[1126] In *Fox Television*, the court stated that, although the Commission had failed to present evidence that the cap in fact promoted localism, localism was a legitimate basis for imposing a national ownership cap.[1127]

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[1123] *1998 Biennial Review Report*, 15 FCC Rcd at 11075 ¶ 30.

[1124] *See* Policy Goals, *supra* Section III.

[1125] *See 1984 Multiple Ownership Report and Order.*

[1126] *1998 Biennial Review Report*, 15 FCC Rcd at 11074-75 ¶ 30.

[1127] "[T]he public interest has historically embraced diversity (as well as localism) . . . and nothing in § 202(h) signals a departure from that historic scope." *Fox Television*, 280 F.3d at 1042.

539. Based on our analysis of the extensive record in this proceeding, we conclude that a national television ownership limit is necessary to promote localism on broadcast television. The evidence suggests, however, that the current 35% cap is not needed the protect localism, and may in fact be hindering public benefits that are expected to follow from an increase in the cap. We conclude that a national cap of 45% fairly balances the competing public interest values affected by this rule. We recognize that our decision to retain a national ownership cap is contrary to our conclusion in 1984. We reach this different conclusion principally because we find that a cap is necessary to protect localism by preserving a balance of power between networks and affiliates, a policy objective that was not considered in the 1984 decision. In this section, we detail the localism analysis. Thereafter, we discuss our modified rule.

(i) Whether a National Cap Promotes Localism

540. In this section we examine the effect of a national television cap on the economic incentives for locally responsive programming by television stations. We also consider evidence that a national cap results in behavior by network-affiliated stations that is responsive to the needs and tastes of a station's local community.[1128]

[1128] Cox argues that allowing networks to significantly expand their station ownership will increase the networks' ability to pressure cable operators, and erode the cable operators' bargaining position, during retransmission consent negotiations. Cox Comments at 41-47; Letter from Alexander V. Netchvolodoff, Senior Vice President of Public Policy, Cox Enterprises, Inc., to Marlene H. Dortch, Secretary, FCC (Feb. 3, 2003) at 1-2. *See also* American Cable Association Petition for Inquiry into Retransmission Consent Practices (filed Oct. 1, 2002); Children Now Comments at 13-15. Fox responds that the negotiations are not affected by the number of stations owned by a network, but by each party's market-by-market evaluation of whether the agreement is beneficial. Letter from John C. Quale, Counsel for Fox, to Marlene H. Dortch, Secretary, FCC (April 21, 2003) ("Fox April 21, 2003 Ex Parte") at 2. Cox's arguments are outside the scope of our biennial review.

(a) Economic Incentives for Localism

541. NAB/NASA contends that the current national cap is needed to preserve affiliates' bargaining power with their networks.[1129] NAB/NASA explains that limiting the national audience that networks can reach through their owned stations promotes a balance of power between networks and their affiliates. NAB/NASA also claims that the cap is necessary to counteract the networks' strong financial incentive to promote the widest distribution across the nation of network programming irrespective of the tastes of one or more particular local cities. The widest possible distribution of programming, according to NAB/NASA, increases viewership of network programming, which maximizes network advertising revenues. According to NAB/NASA, maximum national exposure of programming also improves the likelihood that the program owner will realize additional revenues in the program syndication market. NAB/NASA contends that as broadcast networks have ownership stakes in a larger percentage of their prime time programming, their incentive to create programs with syndication value -- and their incentive to stifle local preemption -- increases.[1130]

542. NAB/NASA argues that the incentive of independently-owned affiliates, in contrast to network-owned stations, is to make programming decisions that are more closely aligned with the needs and tastes of their communities of license.[1131] A network derives its income from the programming that the network produces (and the syndication revenue the programs might generate) as well as from its local stations. A local station maximizes its income by providing programming desired by its local community irrespective of national

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[1129] NAB/NASA Comments at 9.

[1130] *Id.* at 33.

[1131] *Id.* at 10.

programming preferences. Therefore, the programming interests are not always the same.

(b) Evidence of Localism by Affiliates

543. NAB/NASA contends that the national cap is needed to preserve a body of network affiliates not owned by the network that can influence network programming so that it is more suited to the tastes and needs of the affiliates' communities.[1132] In support of this argument, NAB/NASA submitted several examples of the influence independent affiliates can have on network programming:

- When NBC aired a special edition of *Fear Factor*, featuring Playboy bunnies, during halftime of the Superbowl (airing on Fox), affiliates objected to the network promos, which ran during all hours of the day, and included tag lines such as "who needs football when we've got bunnies?"

- NAB/NASA states that when NBC began a trial program to accept liquor advertisements, so many affiliates opted out of airing the ads due to local concerns that NBC dropped the program.

- CBS had scheduled the *Victoria's Secret Fashion Show* for 8 p.m. The affiliates objected to the early showing and urged that the program be moved to the 10 p.m. time slot. In response, CBS moved the show to 9 P.M., although some affiliates nonetheless preempted the show as having inappropriate content for their service areas.

- Promotional ads for NBC's *Dog Eat Dog* included shots of nude contestants promoting the program's challenges such as "strip football" and "strip golf." When affiliates objected to the explicitness of the promos and their airing at all times of day, NBC agreed to eliminate strip stunts from future episodes.

[1132] *Id.* at 27.

- *NYPD Blue* was originally designed to include more nudity and graphic language than is currently aired, but after ABC affiliates objected, the amount of nudity and graphic language in the show was reduced. Even so, a number of affiliates initially refused to carry the show.

- Affiliates expressed concerns about the violent and mature content of the series *Kingpin*, which concerns the life of a drug lord. In response, NBC agreed to allow affiliates to review episodes in advance to ensure the content is appropriate for their local communities.

- In 2002, CBS worked with affiliates to reformat its morning news program, *The Early Show*. One key issue of affiliate concern was whether they would be permitted to provide local news content during the two-hour time block used by the program, as they had with CBS' prior show, *CBS This Morning*. Although some local affiliates are permitted to use the blended format with *The Early Show*, CBS has refused to permit other affiliates to move to the blended local-network news program format.[1133]

- NBC affiliates objected to NBC's intention to broadcast the 2002 Olympic Games live, which would have preempted the evening news on the west coast. After initially resisting the requests of the west coast affiliates to air a delayed broadcast during prime time, the network conducted a viewer survey. Results of the survey, however, substantiated the affiliates' assertion that west coast viewers preferred to watch the games during prime time, and the networks complied.[1134]

- NBC affiliates initially objected to NBC's decision to require live broadcasting of the XFL games. On the west coast, games substantially preempted both the

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[1133] *Id.* at 25-26, 29-30.

[1134] *Id.* at 30-31.

affiliates' early evening local news and the national network news. In other parts of the country, overruns of the game preempted the late night local news. When affiliates raised similar concerns about Arena Football, claiming that overruns would preempt the 6 p.m. local newscasts on the east coast, the network agreed to work with the sports league to ensure the games do not run over.[1135]

- KYTV in Springfield, Missouri, preempted a January 6, 2003 episode of NBC's *Fear Factor*, which airs at 7 p.m. Central Time, that involved contestants eating horse rectums because it found the material inappropriate for its community.[1136]

544. Separate from this "collective negotiation" type of localism, parties also submitted evidence regarding the frequency of station-by-station preemptions for affiliates versus network-owned stations.[1137] Preemptions are instances in

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[1135] *Id.* at 30.

[1136] NAB/NASA Reply Comments at 16-17.

[1137] Affiliates described numerous examples of individual station preemptions of network programming. Some of these examples follow. WRAZ-TV in Raleigh, North Carolina, chose to stop airing *Temptation Island* after Fox revealed that one of the participating couples had a child because "WRAZ will not support a program that could potentially break up the parents of a young child." *Id.* at 17. WFAA-TV in Dallas did not carry the entire first season of *NYPD Blue* because it found the material and language inappropriate for programming scheduled to air at 9 p.m. in that community. *Id.* KNDX in Bismarck, N.D., refused to clear the Fox network's broadcast of the movie *Scream*, which is targeted to young viewers, because of its graphic and disturbing portrayal of teenage murders. *Id.* WFAA-TV, an ABC affiliate in Dallas, was denied permission to preempt *Monday Night Football's* half-time show on November 12, 2001 to cover an American Airlines plane crash. American Airlines is based in Dallas. According to NAB/NASA, ABC permitted two O&Os to preempt the same half-time show to air news covering the same crash. *Id.* at 37-38. CBS did not permit WTSP-TV in Tampa Bay to air a debate between Jeb Bush and Bill McBride during the Florida gubernatorial debate because the

which local stations, whether they are owned and operated by networks or independently owned but affiliated with these networks, choose to air a program other than the program the network distributes to the station. The networks submitted data comparing prime time preemption rates of network-owned stations versus affiliates for 2001. That data showed that affiliates preempted an average of 9.5 hours of prime time programming per year compared with 6.8 hours per year for network-owned stations.[1138] The networks claim that this difference is inconsequential and does not justify retention of a national ownership cap.[1139] Affiliates assert that even this hand-picked data by networks confirms that affiliates preempt more than network-owned stations and that a national cap is needed to protect localism.[1140]

545. Affiliates seek to explain low preemption rates by arguing that networks have increasingly restricted preemption

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affiliate would have preempted the season premiere of *48 Hours*. WTSP-TV was a cosponsor of the debate. *Id.* at 38. A Raleigh North Carolina Fox affiliate refused to air *Who Wants to Marry a Multimillionaire?* because it "felt it was demeaning to women and made a mockery of the institution of marriage." *Id.* at 38-39. WANE-TV, the Fort Wayne, Indiana CBS affiliate, sought to preempt network programming to air a half-hour, early morning local news program geared toward the agricultural community. Although this was initially denied, CBS ultimately relented and granted permission. *Id.* at 39. In this *Report and Order*, we use the terms "network-owned" stations and "O&O" (*i.e.* owned and operated) stations interchangeably.

[1138] Fox Comments, Economic Study G provides data showing: (1) both O&Os and affiliates preempt less than one percent of prime-time programming (in 2001); (2) the four networks' 57 O&O stations preempted an average of 6.8 hours per year per station compared to an average of 9.5 hours per year per station for 651 non-owned affiliates; and (3) on average, O&O stations preempt roughly the same amount of programming – 0.8 hours per station per year – as affiliates for news, political and public affairs programming. Fox Comments, Economic Study G.

[1139] *Id.*

[1140] NAB/NASA Reply Comments at 32-35.

through their network-affiliate contracts. Cox argues that the networks have been exacting greater concessions from their affiliates, including demands to decrease the number of preemptions.[1141] Affiliates complain that they are subject to preemption caps involving financial penalties or loss of affiliation if they exceed the number of network-authorized preemptions,[1142] while affiliates' local programs are often "preempted" by network overruns (*e.g.*, network sports overrunning local news).[1143] For example, Cox submits information gathered from its television stations in which the stations document their conflicts with the networks over network programming and local tastes and station preemptions.[1144] According to NAB/NASA, Fox allows only two preemptions per year, and NBC allows only five hours of prime-time preemptions per year. Affiliates that exceed their allowable preemption "basket" may be subject to financial penalties or even loss of affiliation.[1145] Thus, while a majority of affiliates did not exceed their permitted preemptions,[1146] affiliates argue that there are good reasons for that result. In addition, affiliates note that they often maintain a "cushion" of

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[1141] Cox Comments at 34-38.

[1142] NAB/NASA Comments at 39-43.

[1143] Cox Comments at 34-41; NAB/NASA Comments at 43-45.

[1144] Cox Comments at Appendix C-1.

[1145] NAB/NASA Comments at 39-41. NASA filed a Petition for Inquiry into Network Practices on March 8, 2001, and a Motion for Declaratory Ruling on June 22, 2001. NASA claims, among other things, that contractual language contained in network affiliation agreements violates the "letter and spirit" of Section 310(d) of the Communications Act of 1934, the right to reject rule and the time option rule (47 C.F.R. § 73.658(d) & (e)). We are addressing the merits of this petition separately from this proceeding.

[1146] Disney Comments at 4-7. Disney Exhibit G presents the number of available and used preemptions for ABC affiliates based on negotiated baskets of preemptions. According to Disney, during all of 2001, affiliates used only 56% of the permissible preemptions available to them and out of 189 affiliates, 150 did not exceed their baskets.

unused preemption time in case it is needed, requiring them to exercise discretion in "spending" their preemption time during the year to avoid contractual financial penalties associated with excessive preemption.[1147]

546. *Discussion.* We find that a national television ownership cap is necessary to promote localism. The evidence before us demonstrates both that network affiliates have economic incentives more oriented towards localism than do network-owned stations, and that affiliates act on those incentives in ways that result in networks delivering programming more responsive to their local communities (in the judgment of the affiliate) than they otherwise would. In order for affiliates to continue to serve local community tastes and needs in this way, a national cap is needed to preserve a body of independently-owned affiliates. The two ways in which affiliates can promote localism are by collective negotiation to influence the programming that the networks provide and by preemption by an individual station owner to provide programming better suited to its community.

547. The record shows that network-owned stations and affiliates have different economic incentives regarding the programming aired by local stations. We agree with NAB/NASA's study by Schwartz and Vincent that affiliates have an economic incentive to target their local audience by offering programs suited to local tastes.[1148] In so doing, affiliates have an incentive to tailor their programming schedule to meet local preferences.[1149] Localism is fostered by the affiliates' efforts to promote their own economic interest of maximizing the value of their stations by offering programming that local viewers will prefer to watch, even if the programming replaces the network's nationally scheduled programming.

[1147] NAB/NASA Reply Comments at 36-37.

[1148] NAB/NASA Comments, Schwartz/Vincent Paper.

[1149] Cox Comments at 47-52, 60-62.

548. The 2001 preemption data comparing network and affiliate preemption rates also supports retention of a national cap. The record shows that in 2001, affiliates preempted 9.5 hours per year of prime time programming versus 6.8 hours per year for network-owned stations. This data bolsters our conclusion that affiliates act on their economic incentives to preempt network programming with measurably greater frequency than do network-owned stations. Although we agree with the networks that the total number of hours preempted by both types of station owners in this comparison is relatively small, these data are for the prime time viewing period, when the vast majority of television viewing occurs. In our view, the practical effect of prime time preemption is far greater than that of preemption during other dayparts.

549. We cannot agree with Fox that network-owned stations provide the same localism value that independently-owned affiliates do. Fox argues that networks listen to the management of network-owned stations as well as to the management of affiliates. It claims that managers of O&Os participate during the networks' program development process and provide more credible input than the management of affiliate stations.[1150] Fox also asserts that affiliates have an "inherent economic conflict" with the network regarding the distribution of profits, have no influence in the development of new programs, and learn of the new programs at the same time as do advertisers.[1151]

550. We agree with Fox that affiliates have an inherent economic conflict with networks. However, we believe that affiliates' economic incentives actually help explain why affiliates regularly raise programming concerns with networks and why affiliates preempt more network programming, on average, than do network-owned stations. In our view,

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[1150] Fox April 21, 2003 Ex Parte at 2.

[1151] *Id.*

affiliates' economic incentives to maximize local viewership works to promote localism.

551. In addition, Fox's claim of minimal affiliate influence over programming is overcome by the significant evidence submitted by NAB/NASA that affiliates regularly raise programming concerns with networks and frequently succeed in altering network programming in ways that protect local interests. These numerous instances of the collective influence brought to bear by affiliates on network programming decisions represents a powerful force for the protection of local viewing interests. They represent empirical evidence that affiliates collectively serve as an important counterweight to network programming decisions by influencing networks to deliver programming responsive to local tastes.

552. In sum, we believe that this affiliate/network dynamic is beneficial to viewers and should be preserved. We conclude that eliminating the cap altogether would shift the balance of power with respect to programming decisions toward the national broadcast networks in a way that would disserve our localism policy.[1152]

(ii) Appropriate Level of the Cap

553. In the preceding section, we found that a national television ownership cap continues to be necessary to promote localism because the record demonstrates that affiliates affect network programming in ways that respond to viewer preferences in affiliates' local communities. In this section, we examine the specific effects of the current 35% cap and whether this particular level achieves our localism objectives.

554. *Preemptions*. Affiliates argue that the networks have limited their ability to preempt network programming in order

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[1152] Our concerns are substantiated by statements from consumer groups asserting that large companies are less responsive to consumer complaints. *See* Catherine Yang, *The FCC's Loner is No Longer So Lonely*, BUS. WK. (Mar. 24, 2003) at 78.

to provide programming more geared to local needs and interests, and that these limits have become more formidable as the networks have extended their ownership of stations.[1153] Affiliates argue that an increase in the national cap reduces affiliates' ability to resist network pressure not to preempt. The affiliates point to a decline in affiliate preemptions following the 1996 increase in the cap from 25% to 35%. The affiliates' submission indicates that, with respect to all dayparts (as opposed to prime time-only), affiliates preempted, on average, 48 hours per year between 1991 to 1995 and 36 hours per year between 1996 to 2001.[1154] It also shows that, in the year 1995, the year before the cap was increased to 35%, there were, on average, 46 hours of programming preempted, but by the year 2001 the average had declined to 33 hours.

555. The networks offer two responses to the affiliates' data. First, the networks submit preemption data that, according to the networks, shows that the 35% cap has no effect on bargaining power between networks and affiliates. The networks contend that if higher levels of network station ownership actually increased networks' leverage over their affiliates, we would expect affiliates of the largest network station owners to preempt less (because of their diminished bargaining power) than affiliates of a network that had significantly less station ownership. The networks data shows that affiliates of the largest network-owners (CBS and Fox, at 39% and 38% national reach respectively) preempt to an equal or greater extent than do affiliates of ABC, with a national reach of 23%.[1155] The networks assert that this data proves that the 35% cap has no effect on bargaining leverage between networks and affiliates.[1156]

[1153] NAB/NASA Comments at 31.

[1154] *Id.* at 16.

[1155] Fox April 21, 2003 Ex Parte at 8-9.

[1156] *Id.* In a motion filed May 28, 2003, NAB/NASA asked the Commission

556. Second, the networks argue that affiliate preemptions often are not for programming that is of greater public interest, but for syndicated programs.[1157] The data Disney submits suggests that more affiliates preempted ABC programming in favor of syndicated programming than for local specials.[1158] In addition, Disney states that very few half hours of affiliate prime-time preemptions were for news, political, or public affairs programming.[1159] Disney's data, however, is countered by a NAB/NASA survey of affiliated stations, in which respondents reported preempting network programming for: local breaking news (83% of respondents); local news (71% of respondents); local emergencies (70% of respondents); local political programming (74% of respondents); local sports (75%

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to disregard certain portions of network submissions concerning preemption and local news quantity because the networks have not provided the data underlying those submissions. Alternatively, NAB/NASA asked the Commission to infer that the underlying data would not favor the networks' positions on preemption and news quantity of O&O versus affiliate stations. The portions of the network filings the Commission is asked to disregard include, *inter alia*, EI Study G and Disney Exhibit G, relating to preemptions, and EI Study H, relating to local news quantity. Fox opposed the motion on May 29, 2003. We will afford the record evidence the appropriate weight in light of all circumstances, including the extent to which we believe the underlying data is necessary to make an informed decision about the showing.

[1157] Disney Comments at Exhibit H shows, among other things, that during the first quarter of 2002, affiliates preempted ABC programming more for syndicated programming than for local specials.

[1158] Disney Comments at 4-7. Disney Exhibit J shows, among other things, that during the first quarter of 2002, affiliates preempted ABC programming more for syndicated programming (201 half-hours) than for local specials (188 half-hours).

[1159] *Id.* The remaining prime-time preemptions were for sports, telethons, syndicated and local entertainment, paid programming, and paid religious specials. Disney Exhibit J shows that, for all of 2001, of 3,694 half-hours of primetime preemptions, 291 were for news, political, or public affairs programming; 574 half-hours were for telethons; 864 half-hours were for entertainment; 105 were for news; 171 were for public affairs; and 1,561 were for sports related shows.

of respondents); religious programming (47% of respondents); "other" programming (*e.g.*, parades, telethons, syndicated programming, movies) (34% of respondents).[1160]

557. Apart from contractual restrictions, a majority of affiliates responding to a NAB/NASA survey -- 68% -- report that they have "experienced pressure from [their] network to not preempt programming."[1161] UCC provides several instances of increased network resistance when affiliates attempted to air programs deemed to be of greater local interest than the network programming. For example, it cites to the experience of Belo's ABC affiliate in Dallas, the headquarters of American Airlines, which failed to get the network's permission to preempt the November 12, 2001, Monday Night Football halftime show for local news updates on the American Airlines jet crash in New York that morning.[1162]

558. *Discussion.* Although we concluded in the prior section that a national cap is needed to balance power between networks and affiliates, the record suggests that maintaining the cap at 35% is not necessary to preserve the balance of bargaining power between networks and affiliates. In reaching this conclusion, we rely principally on the evidence showing that the largest network station owners possess no greater bargaining power – as measured by prime time preemptions –

[1160] NAB/NASA Comments at 17-18, Table 2, Attachment 2.

[1161] *Id.* at 17. NAB/NASA sent the survey to 422 ABC, CBS, and NBC affiliated stations asking them to report on their experience with networks regarding preemption. It reports receiving 201 "usable" responses.

[1162] UCC Comments at 51-52 (citing Michele Greppi, *The Insider: A(BC's) Tale of Too-Different Cities*, ELECTRONIC MEDIA (Nov. 19, 2001) at 8). Among its other examples, CBS pressured a Florida affiliate into running the season premier of "48 Hours" instead of the state's gubernatorial debate. UCC Comments at 52 (citing Wes Allison, *Local PBS Affiliate Will Air Debate*, ST. PETERSBURG TIMES (Sept. 25, 2002) at 1B.). Also, NBC resisted attempts by affiliates to preempt a baseball game to air a presidential debate during the 2000 campaign. UCC Comments at 52 (citing Neil Hickey, *Unshackling Big Media*, COL. J. REV. (July/Aug. 2001) at 30).

than the smallest network station owner. We find this evidence persuasive because it directly compares the extent to which different levels of network ownership of stations actually affect the level of preemption by those networks' affiliates. Implicit in this analysis is an assumption that that data, although not a perfect proxy, is a reliable indicator of relative bargaining power between networks and affiliates. Preemption of network programming by an affiliate has negative consequences to the network, and networks by all accounts seek to avoid preemption by affiliates.[1163] So the ability of an affiliate to preempt in the face of networks' incentives to *prevent* preemption appears to be a reasonable measure of relative bargaining power between networks and affiliates.

559. We are not persuaded by the affiliates' argument that the 35% cap is needed to protect localism because the most recent national cap increase resulted in fewer affiliate preemptions. The principal deficiency in this argument is that it does not control for other plausible causes of the decline in affiliate preemptions. Although NAB/NASA suggests that the 1996 increase in the national cap reduced affiliates' bargaining power, NAB/NASA itself identifies other factors occurring in the same timeframe as the national cap increase that it claims have further eroded affiliate bargaining power. NAB/NASA asserts that the Commission's repeal of its financial interest and syndication rules in the early 1990s gave networks an additional financial incentive (in addition to their incentive to avoid preemption to maximize advertising rates) to discourage affiliate preemption. NAB/NASA contends that vertical integration, including program ownership and syndication by broadcast networks and the trend toward "repurposing" of network programming on affiliated non-broadcast channels

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[1163] *See, e.g.*, NAB/NASA Comments at 17 (stating that 68% of affiliates responding to a survey claimed that they have "experienced pressure from [their] network not to preempt programming").

have helped increase the networks' leverage over affiliates.[1164] To the extent these additional factors actually enhance network bargaining leverage as NAB/NASA contends, they undercut NAB/NASA's argument that it was specifically the 1996 increase in the national cap that caused affiliates to reduce their preemption of network programming.

560. A more accurate assessment of the impact of the 1996 national cap increase on network-affiliate bargaining leverage could be made if affiliate preemption rates from 1991 through 2001 could be compared to the preemption rates of network-owned stations during that same period. If preemption rates on network-owned stations were similar to affiliate preemption rates over that same period, we might have a more certain -- and completely different -- explanation for the decline. Networks might well have persuaded us that the uniform decline in preemptions by O&Os and affiliates was caused by some plausible reason unrelated to the change in the national cap. On the other hand, if the data had shown preemption rates on network-owned stations remaining steady while affiliate preemptions declined sharply after 1996, then the affiliates' explanation for the decline (*i.e.* increase in the national cap) would carry more weight than we give it here.

561. The foregoing analysis of preemption data excludes consideration of the content of the programming substituted by the local station for the network programming. Other than our interest in promoting market structures that encourage local news production, we seek to avoid resting broadcast ownership policies on subjective judgments about the public policy value of different types of locally-substituted programming. We agree with NAB/NASA that it is enough, for purposes of assessing stations' responsiveness to local communities, that they preempted network programming. The judgment of when

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[1164] *Id.* at 31-39.

to preempt and what to substitute are uniquely within the judgment -- and responsibility -- of the station.

562. Thus, we reaffirm our conclusion, in the *1998 Biennial Review Report*, that independently-owned affiliates play a valuable role by "counterbalancing" the networks' economic incentive to broadcast their own programming "because they have the right . . . to air instead" programming more responsive to local concerns.[1165] But, the evidence suggests that the current limit of 35% is overly restrictive and that the cap may safely be raised and the benefits of wider network station ownership achieved (discussed below) without disturbing either this balance or affiliates' ability to preempt network programming.

(iii) Other Effects of the Current 35% Cap

563. In the preceding sections, we examined two measures of localism -- collective affiliate influence on network programming and specific preemption levels by affiliates versus network-owned stations. In this section we consider a third measure -- the effect of the national cap on the quantity and quality of local news and public affairs programming. We examine this area because local news and public affairs programming can play an important role in citizen participation in local and state government affairs. Thus we seek market structures among broadcasters that encourage stations to produce local news and public affairs programming and thereby contribute to an informed citizenry.

564. In its 1984 decision, the Commission compared the quality and diversity of programming by stations owned by group owners – both network and non-network owners – with that of singly owned stations. It concluded that there was no

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[1165] *1998 Biennial Review Report*, 15 FCC Rcd at 11075 ¶ 30. In its remand, the *Fox Television* court did not dispute the Commission's view in the 1998 decision, but said the Commission failed to show whether it had received evidence substantiating its 1998 conclusion or repudiating its 1984 conclusion. *Fox Television*, 280 F.3d at 1043.

evidence that group owners provided less or lower quality news and public affairs programming than single owners.[1166] The *Fox* court criticized the Commission for failing to explain in the *1998 Biennial Review Report* why it departed from this conclusion. With the decline in the number of individually owned stations, an increase has occurred in the number of stations sharing common ownership. The Commission sought in this biennial review to understand whether the national TV ownership rule, by preserving a class of affiliates, affects localism by comparing the local news and public affairs programming of network owned and operated stations to that of non-network owned affiliates. We discuss the evidence and our conclusions below.

565. *Quantity of local news and public affairs programming.* In the *Notice*, the Commission requested evidence regarding any clear relationship between the ownership of stations and the quantity and quality of local news and public affairs produced by those stations.[1167] A study conducted by Commission staff concluded that network-owned stations produced more local news and public affairs programming than affiliates and received local news excellence awards more frequently than affiliates.[1168] Responding to that study, NAB/NASA submitted a study indicating that many of the results of MOWG Study No. 7 changed when data pertaining to stations belonging to Fox were not used.[1169] The final study, submitted by Dr. Michael Baumann of Economists Inc., demonstrates that no defensible reason exists for deleting the Fox station data.[1170] This final,

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[1166] *1984 Multiple Ownership Report and Order*, 100 F.C.C.2d at 32-34 ¶¶ 44-51.

[1167] *Notice*, 17 FCC Rcd at 18550 ¶ 148.

[1168] MOWG Study No. 7 at 3-6.

[1169] NAB/NASA Early Submission (Dec. 9, 2002).

[1170] Letter from Susan L. Fox, Vice President, Government Relations, Disney, to Marlene Dortch, Secretary, FCC (Feb. 13, 2003) ("Disney Feb.

comprehensive study provides analysis purporting to demonstrate that network-owned stations, on average, produce more local news than do affiliates across all-sized markets, with an even greater difference in the amount of news offered by network-owned stations in smaller markets.[1171]

566. The results of MOWG Study No. 7 show that network-owned stations air 23% more local news and public affairs programming per week than affiliates (22.8 hours versus 18.5 hours).[1172] In response to MOWG Study No. 7, NAB/NASA conducted a study that revealed no statistically significant difference between hours of local news aired by affiliates and O&O stations.[1173] Unlike MOWG Study No. 7, the NAB/NASA study included data on ABC, NBC and CBS, but did not include data on Fox Television.[1174] Disney argues that there is no policy-based rationale for excluding Fox stations.[1175] Using the NAB/NASA data, but accounting for all four of the networks, Dr. Baumann determined that network-owned stations on average provide more local news -- about 4.2 hours

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13, 2003 Ex Parte"). In response to a criticism of MOWG Study No. 7, which could also apply to Fox Economic Study H, Economists Inc. conducted a slightly modified analysis filed as part of "Economic Comments on Media Ownership Issues"), which was attached as an exhibit to the Fox Reply. *See also* Fox Comments, Economic Study H.

[1171] Disney Feb. 13, 2003 Ex Parte at Attachment.

[1172] Only MOWG Study No. 7 examined newspaper-owned affiliates separately from the other affiliates. It showed that, on average, newspaper-owned affiliates provided more hours per week of local news and public affairs (about 22 hours) than did the other affiliates (approximately 15 hours). The study also showed that network O&Os provided the most local news of all (almost 23 hours).

[1173] NAB/NASA Early Submission (Dec. 9, 2002).

[1174] *Id.* On May 5, 2003, NAB/NASA submitted another letter reiterating its argument. The submission, however, provided no new data or additional information. *See* Letter from Alan Frank, Chair, NASA, to Michael K. Powell, Chairman, FCC (May 5, 2003) ("NASA May 5, 2003 Ex Parte").

per week -- than do affiliates in all markets. In markets outside the top 25 markets, network-owned stations provide almost eight more hours of local news each week than affiliates do. Inside the top 25 markets, Disney agrees with the NAB/NASA study results that the difference between network-owned stations and affiliates was not statistically significant.[1176]

567. In Dr. Baumann's study, a third data set was used in analyzing local news and public affairs programming on network-owned and affiliate stations.[1177] Results, however, were similar to the first two studies: network-owned stations produce about 6.4 more hours per week of local news than affiliates in all markets tested. As with the modified NAB/NASA data, in markets outside the top 25 markets, network-owned stations provide about 9 hours additional local news each week. This study agrees with the NAB/NASA results that the difference between network-owned stations and affiliate stations in news provided was not statistically significant in markets inside the top 25 markets.[1178]

568. *Local News Quality*. Although the Commission does not regulate programming quality, it has attempted to strengthen the ability of local stations to serve their communities through news and public affairs programming. In the *Notice*, we sought to understand whether the national TV ownership rule may have the effect of increasing or decreasing the quantity and/or quality of local news and public affairs

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[1175] Disney Feb. 13, 2003 Ex Parte, Attachment at 7, n.6.

[1176] *Id.* at 8-9; NAB/NASA Early Submission (Dec. 9, 2002).

[1177] The measure of weekly minutes of local news, public and current affairs programming was provided by TV Guide for a week in May 2002. The set of explanatory variables includes market rank, whether a station was an O&O or not, and other market characteristics. Disney Feb. 13, 2003 Ex Parte, Attachment at 10.

[1178] *Id.* at 12; NAB/NASA Early Submission (Dec. 9, 2002).

programming.[1179] Studies discussing programming quality were submitted in the record.

569. MOWG Study No. 7, for example, finds that network O&O stations win more awards for local news programming than non-O&O affiliates. In evaluating the quality of local news programming, the authors used three measures: (1) ratings received for local evening news; (2) awards from the Radio and Television News Directors Association (RTNDA); and (3) the local television recipients of the Silver Baton of the A.I. Dupont Awards. The ratings of network-owned stations and affiliates were virtually identical during the period tested. However, with respect to the receipt of RTNDA awards for news excellence, network-owned stations received those awards at a rate of 126% of the national average and affiliates received them at 96% of the national average. The study found, with respect to the DuPont awards, network-owned stations received awards at 337% of the national average, while affiliates received awards at 77% of the national average.

570. The results of a second study, however, indicate that quality differences between network-owned stations and affiliates are virtually nonexistent. In comparing the record of network-owned stations and affiliates' news operations, a study by Economists Inc. on behalf of the networks focused on the RTNDA awards, one of the awards used in MOWG Study No. 7.[1180] It reasoned that, because a larger number of RTNDA awards are given out each year, they are more likely to offer a better measure of news quality than the DuPont awards. The study examined the RTNDA awards from two perspectives, first analyzing the awards bestowed in the top 10 markets, and then the top 50 markets. The study concludes that, in either setting, "there is no discernible difference between network-

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[1179] *Notice*, 17 FCC Rcd at 18550 ¶ 148.

[1180] Response of Fox to NAB/NASA Early Submission (Dec. 19, 2002) at 5 and App. 1.

owned stations and affiliates with respect to RTNDA awards."[1181] Neither this study nor MOWG Study No. 7 suggests that affiliates provide higher quality local news and public affairs programming than network-owned stations. Thus, the studies provide evidence that a national limit of 35% is not necessary to preserve a class of affiliates in order to maintain high quality local news and public programming.

571. UCC argues that the number of awards received by stations is not a reliable measure of quality because the awards are not equally available to both network stations and affiliates. It argues that stations must apply for awards and pay entry fees to be considered.[1182] Moreover, it argues, networks generally have promotion and publicity departments that handle award entries, while local stations do not.[1183] While we agree with UCC that factors unrelated to quality programming can affect the number of awards received, there is no evidence that these factors had any measurable effect on the conclusion that network-owned stations' news programming is at least equivalent in quality to that of affiliates.

572. A third study finds that smaller station groups tend to produce higher quality newscasts than larger groups.[1184] In the PEJ Study, affiliates generally had higher quality scores than network-owned stations. Sixteen percent of affiliate stations earned "A's" in programming quality versus 11% of network-

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[1181] *Id.* at App. 1 at 10-11. This study used the same data as MOWG Study No. 7.

[1182] UCC Comments at 55 (citing Radio-Television News Directors Association and Foundation, *Awards and Scholarships: 2003 RTNDA Edward R. Murrow Awards*, at www.rtnda.org/asfi/awards/murrow.shtml; The Graduate School of Journalism at Columbia University, *Alfred I. DuPont Columbia University Awards*, www.jrn.columbia.edu/events/dupont/entryform.pdf).

[1183] *Id.* (citing E-Mail from Jonnet S. Abeles, Director, Alfred I. DuPont Awards, Columbia School of Journalism, Nov. 7, 2002).

[1184] PEJ Study, supra note 769.

owned stations.[1185] According to PEJ's survey results, affiliates generally demonstrate somewhat more enterprise, cite more sources, tend to be more local, and are more likely to air stories that affect the community. Network-owned stations, on the other hand, are more likely to air national stories with no local connection, although they tend to air more points of view and score better in finding the larger implications of a story.[1186] The study also shows that only 22% of stations owned by the 25 largest group owners earned "A" grades for quality, compared with 48% of midsize and small groups. It acknowledges, however, that ratings for local news programming are growing more rapidly at larger group-owned stations than at smaller ones.[1187] Results of the PEJ Study suggest that being a network-owned station does not "improve the kind of local news that citizens see."[1188]

573. A critique prepared by Economists Inc. asserts that PEJ's principal findings are statistically insignificant.[1189] In addition, they contend the study relies on subjective measures of newscast quality, and does not account for other factors affecting news quality, such as geographic differences. In the critique, Economists Inc. states that PEJ has advised that it will not make underlying data available for analysis and review within the time frame of this proceeding; thus only limited information is available for use in determining the validity of PEJ's results.[1190] PEJ responds that the point of its survey was to identify patterns and trends in news quality. It asserts that it was not trying to prove a particular theory of cause and effect

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[1185] *Id.* at 4.

[1186] *Id.* at 9.

[1187] *Id.* at 3.

[1188] *Id.* at 8.

[1189] Economists Inc., "*The Project for Excellence in Journalism's PEJ Study of Ownership and Quality of Newscasts: A Critique*" (Mar. 13, 2003).

[1190] *Id.* at 2.

with its research, and states it has no financial stake in the outcome.[1191] Whether or not the PEJ Study is unbiased, its results appear statistically insignificant, the underlying data have not been made available, and therefore it cannot be considered reliable or convincing evidence.

574. The affiliates argue, however, that localism cannot be limited to local news and public affairs; rather, it is a rich mix of programming, and that the Commission itself has previously identified other elements, such as opportunities for local self-expression, development and use of local talent, weather and market reports, and sports and entertainment programming as necessary and desirable in serving the broadcast needs and interests of local communities.[1192] As we said in the *Notice*, stations may fulfill their obligation to serve the needs and interests of their communities by presenting local news and public affairs programming and by selecting other programming based on the particular needs and interests of the station's community.[1193] Thus, we acknowledge that other kinds of programming are important in serving local needs. However, we must rely on the data in the record, which focuses on two aspects of localism – program selection decisions by affiliates (preemption/collective negotiation) and the quality and quantity of local news and public affairs programming. From the data, we conclude that network-owned stations provide local news and public affairs programming that is at least equal, and may be superior, to that of affiliates.

575. *Discussion.* We conclude that the national cap is not necessary to encourage local stations to air local news and public affairs programming. The record actually suggests that the national cap diminishes localism by restraining the most

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[1191] PEJ Study, *supra* note 769.

[1192] NAB/NASA Reply Comments at 4 (citing FCC Form 303, Attachment A of 1960 Report and Statement of Policy re: Commission En Banc Programming Inquiry (July 29, 1960)).

[1193] *Notice*, 17 FCC Rcd at 18526 ¶ 70.

effective purveyors of local news from using their resources in additional markets. The studies before us show that network-owned stations air, on average, more local news and public affairs programming than affiliates overall.[1194] MOWG Study No. 7 found that network-owned stations aired 4.3 hours more local news per week than did affiliates.[1195] The Baumann study concluded that the differential was 6.4 hours per week.[1196] The principal objection to the findings of these two studies was NAB/NASA's criticism that exclusion of the Fox stations from those two studies would nullify the differential between the two groups of stations.[1197] We agree with Disney that no valid reason exists for excluding the Fox stations.

576. The record also shows that local news on network-owned stations appears to be of higher quality than news on affiliate stations. MOWG Study No. 7 found that network-owned stations received local news excellence awards at a significantly higher rate than did affiliates. For the DuPont awards, networks received 337% of the national average compared with 77% for affiliates. For the RTNDA awards, networks received 126% to affiliates' 96%.[1198] We disagree with commenters relying on the PEJ study to show that smaller group owners tend to produce higher quality local news. We agree with the networks that the findings of the PEJ are statistically insignificant. In other words, according to widely-accepted scientific standards, there is an unacceptably large risk that the PEJ's findings are attributable to random noise in the data. The PEJ Study reports the differences in percentages of

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[1194] MOWG Study No. 7.

[1195] *Id.*.

[1196] Disney Feb. 13, 2003 Ex Parte.

[1197] NAB/NASA Comments at 46.

[1198] A score of 100% for a station group would indicate that the stations in that group won precisely the number of awards that would be expected given the number of stations in that group relative to the total number of stations in the U.S.

newscasts that received a particular grade, but fails to provide any statistical testing on these results. The networks conducted these statistical tests and determined that the differences in news quality were not large enough to conclude that the probability of a newscast getting a particular grade was dependent on the ownership group that aired the newscast.

577. In sum, the record shows that the national cap is not necessary to promote high quality, or relatively larger amounts of, local news programming. The record suggests the opposite – that the current cap prevents networks from acquiring more stations and providing enhanced local news operations.

3. Modification of the National Television Ownership Rule

578. We have concluded that an audience reach cap of 35% is not necessary to promote diversity or competition in any relevant market. We are persuaded, however, that a national cap at some level is needed to promote localism by preserving the balance of power between networks and affiliates. We found that affiliates' incentives are more attuned to their local communities than are those of networks, which seek to assure that the largest audiences possible are watching their programming at the same time. We conclude from the record that preserving a balance of power between a network and its affiliates promotes localism, and accordingly, we will continue to restrict the national audience reach of station owners.

579. Given the benefits to innovation discussed above that derive from having a number of separately-owned station groups, we believe the national ownership cap should continue to apply to all station owners, including those that are not networks. The record shows that there have been a number of instances where having a variety of owners has led to innovative programming formats and technical advances, and we believe that applying the national ownership cap to all station owners will continue to spur innovation, which we believe will be particularly valuable in transitioning to digital

television. In addition, applying the cap to all station owners adheres to our longstanding policy of refusing to differentiate among different categories of station owners for purposes of the national TV ownership rule.[1199]

580. The next task is to determine what the ownership limit should be. As the court in *Sinclair* recognized, the Commission has wide discretion when drawing administrative lines.[1200] Having found that 35% is too low and 100% (or no limit) is too high, after considering the evidence in the record, we apply our discretion and raise the national ownership cap to 45%. This modification, fundamentally, is a line-drawing exercise in which we attempt to balance the benefits of a television ownership cap against the factors favoring an incremental increase. Finding a point between 35% and 100% is a matter of judgment falling within the particular expertise of the Commission.[1201]

581. We have decided to modify the national cap by raising it 10 percentage points for three primary reasons.[1202] First, while

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[1199] *See 1984 Multiple Ownership Report and Order*, 100 F.C.C.2d at 50-54 ¶¶ 97-107; *1985 Multiple Ownership MO&O*, 100 F.C.C.2d at 87 ¶ 30 n.36 (since the adoption of a national TV ownership restriction, the limitations "have been applied in a uniform manner to all industry participants").

[1200] *Sinclair*, 284 F.3d at 162.

[1201] *AT&T Corp. v. FCC*, 220 F.3d 607, 627 (D.C. Cir. 2000) (the Commission "has wide discretion to determine where to draw administrative lines"); *Cassell v. FCC*, 154 F.3d 478, 485 (D.C. Cir. 1998) (the Commission's line-drawing is entitled deference so long as it is not "patently unreasonable"); *Health and Medicine Policy Research Group, et al. v. FCC*, 807 F.2d 1038, 1043 (D.C. Cir. 1987) ("the scope of review is particularly limited when the FCC engages in 'the process of drawing lines'"); *Hercules Inc. v. EPA*, 598 F.2d 91, 107-108 (D.C. Cir. 1978) (agency's numbers must only be within a "zone of reasonableness"). *See also* Letter from Jonathan D. Blake, Counsel for NASA, and Henry L. Baumann, Executive Vice President for Law & Regulatory Policy, NAB, to the FCC Chairman and Commissioners (April 30, 2003) at 1.

[1202] *But see* Letter from Jonathan D. Blake, Counsel for NASA, to Marlene Dortch, Secretary, FCC (May 8, 2003) Attachment at 7 (no evidence to

affiliates argue that it is necessary to preserve a balance of power between networks and affiliates so that affiliates can maintain adequate preemption rights, it is evident that networks can exceed a nationwide audience reach of 35% without harming affiliates' abilities to preempt network programming. As discussed above, affiliates of networks with a national reach of greater than 35% seem to have no less bargaining power than affiliates of networks with less than 35% national reach. In accordance with Section 202(h), therefore, the cap must be modified upward. The record does not, unfortunately, help us identify with any precision the point at which a network audience reach would be so large that affiliate bargaining power would be substantially undermined. Given that we are interested in finding a point at which the balance of power between networks and affiliates is roughly equal, however, we believe that a national audience reach cap of approximately half of all homes would be appropriate.

582. Second, we are mindful of the predictive nature of this line-drawing exercise and we have some concern about allowing significant new aggregation of network power absent more compelling evidence regarding the possible effects of that aggregation above current limits. Accordingly, and in light of the fact that Congress raised the ownership cap by ten percentage points in 1996, from 25% to 35%, we are inclined to take a similarly incremental approach and increase the cap by an additional 10 percentage points. Although a cap of 45% does not equate to a precisely equal degree of national reach for networks and their affiliates, a 45% limit ensures that networks will not obtain a greater national audience reach than their affiliates collectively will have.

583. Finally, although we elect not to modify the cap to the point advocated by Paxson (50%), we agree with Paxson that the cap should "accommodate all existing broadcast

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support raising the cap to 40%, 45% or 50%) ("NASA May 8, 2003 Ex Parte").

combinations and give some additional room for growth."[1203] A 45% cap will allow some, but not unconstrained, growth for each of the top four network owners.[1204] Broadcast networks have lost market share in recent years to cable and DBS, and allowing them to achieve better economies of scale and scope may help them remain competitive in the marketplace.[1205] Further, given the rise in programming costs and increasing competition from non-broadcast national media, the economies of scale and scope made possible by network expansion of station ownership will contribute to the preservation of over-the-air television by deterring the migration of expensive

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[1203] Paxson Comments at 13-15. We decline to adopt Paxson's suggestion that we establish a presumption to increase the cap biennially by at least 2.5% until it reaches 60%. *Id.*

[1204] Under the current rule, ABC owns ten stations reaching 23.6% of the national audience; CBS owns 39 stations reaching 39% of the national audience (these stations include the CBS as well as the UPN owned and operated stations, including 3 satellite stations); Fox owns 37 stations reaching 37.8% of the national audience (includes two satellite stations); and NBC owns 29 stations reaching 33.6% of the national television audience (these stations include the NBC as well as the Telemundo owned and operated stations, as well as a station located in Puerto Rico). *The Top 25 TV Station Groups*, B'CASTING AND CABLE (Apr. 7, 2003) at 32-34. There are currently 1,340 commercial television stations licensed by the Commission. The percentage of these television stations owned by each of these networks is as follows: ABC owns less than 1%; CBS owns approximately 3%; Fox owns approximately 3%; and NBC owns approximately 2%.

[1205] Paxson Comments at 10 (due to competition from cable and DBS, network prime time viewership has declined to 57%) (citing *2001 Video Competition Report*, 17 FCC Rcd at 1282). *See also* Letter from Jared S. Sher, Counsel for Fox, to Marlene Dortch, Secretary, FCC (April 30, 2003), Attachment at 52-54. We disagree with NAB/NASA that network profitability is not a valid reason for raising the national cap in this proceeding. *See* Letter from Jonathan D. Blake, Counsel for NASA, and Henry L. Baumann, Executive Vice President for Law & Regulatory Policy, NAB, to the FCC Chairman and Commissioners (April 23, 2003) at 1-2; NASA May 5, 2003 Ex Parte at 2-3; NASA May 8, 2003 Ex Parte, Attachment at 5-6.

programming, such as sports programming, to cable networks.[1206] Accordingly, we herein modify the national audience reach rule to impose a 45% cap.

584. Although we affirm our finding in the *1984 Multiple Ownership Report and Order* that increased network ownership of stations will not harm either competition or diversity,[1207] our decision to retain a national ownership cap is a departure from our conclusion in 1984 that the national TV ownership rule should be repealed.[1208] In 1984, we gave very limited consideration to the potential effects of the cap on localism.[1209] That attention was devoted to the quality and quantity of news and public affairs programming on group-owned versus individually-owned stations.[1210] In this *Report and Order*, by contrast, we have expanded our "localism" measures to include the important consideration of program selection by local stations. The 1984 decision did not address the balance of power between networks and affiliates and how that affects

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[1206] Fox Comments at 43 (the rule limits the return that networks can earn on their programming investments and drives them to direct their resources away from free television and toward subscription-based cable channels). Viewers complain that desirable programming already has begun migrating to subscription-based outlets. Thomas Smith Comments at 4; *see also* NABET-CWA Reply Comments at 2; The Grange Reply Comments at 3; Fox May 2, 2003 Ex Parte at 16; Letter from John C. Quale, Counsel for Fox, to Marlene Dortch, Secretary, FCC (May 12, 2003), Attachment 2 at 5-7.

[1207] *1984 Multiple Ownership Report and Order*, 100 F.C.C.2d at 46, 50-54 ¶¶ 86, 97-107.

[1208] *See id.* at 18-20 ¶¶ 4-10.

[1209] In our 1984 decision, we acknowledged that "network-owned stations have rendered meritorious service to their local communities." *Id.* at 53 ¶ 105. This observation, which continues to hold true, does not, however, negate the importance of the affiliates' role in furthering localism.

[1210] *Id.* at 31-36 ¶¶ 44-56.

program selection.[1211] It is this factor that is the central factor in our decision to retain a national cap.

4. UHF Discount

585. In the *Notice*, the Commission invited comment on the relevance and continued efficacy of the 50% UHF discount.[1212] The *Notice* explained that the discount was enacted because UHF stations were competitively disadvantaged by weaker signals and smaller household reach than VHF stations.[1213] In light of greater carriage of UHF stations on MVPDs since enactment of the UHF discount in 1985, we sought comment on the continued need for the UHF discount.

586. We conclude that the UHF discount continues to be necessary to promote entry and competition among broadcast networks. VHF signals typically reach between 72 and 76 miles, while UHF signals reach approximately 44 miles. This signal disparity results in a significantly smaller household reach of UHF signals compared with VHF signals. Fox, NBC and Viacom submitted data showing that, in markets where they own both a UHF and a VHF station, the UHF station reaches between 56% and 61% of the service area of their VHF stations.[1214] Similarly, Paxson states that in eight cities where it owns UHF stations, its stations reach between 35.7% and

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[1211] *See* Cox Comments at 9; Letter from Jonathan D. Blake, Counsel for NASA, and Henry L. Baumann, Executive Vice President for Law & Regulatory Policy, NAB, to Marlene Dortch, Secretary, FCC (May 9, 2003), Attachment at 2; Letter from Jonathan D. Blake, Counsel for NASA, and Henry L. Baumann, Executive Vice President for Law & Regulatory Policy, NAB, to the FCC Chairman and Commissioners (May 15, 2003) at 1-2.

[1212] *Notice*, 17 FCC Rcd at 18545 ¶¶ 130-131. The UFH discount is intended to recognize the deficiencies in over-the-air UHF reception in comparison to VHF reception.

[1213] *Id.* at 18545 ¶ 130.

[1214] Letter from John C. Quale, Counsel for Fox, to Marlene Dortch, Secretary, FCC (May 20, 2003) ("Fox May 20, 2003 Ex Parte").

78.2% of the homes reached by VHF stations in those markets.[1215]

587. This diminished UHF signal area coverage affects UHF stations' ability to compete with VHF stations in two ways. First, although cable and DBS operators serve 86% of U.S. households, the Commission recently determined that roughly 30% of television sets are not connected to MVPD service and receive exclusively over-the-air broadcast stations.[1216] UHF stations reach far fewer of these broadcast-only viewers as VHF stations. Second, weaker UHF signals make it more difficult for a UHF station to qualify for cable and DBS carriage. Commission regulations require a local television station to place a Grade B signal over the cable or DBS headend in order to quality for carriage.[1217] Alternatively, if a station does not place a Grade B signal over the headend, it may pay for an alternative method of delivering its signal to the headend, such as a fiber optic connection.[1218] Non-carriage on a cable system will, as a practical matter, make the UHF station unavailable to homes in the MVPD's service area.

588. In addition to diminished signal coverage, UHF stations require between 1.5 and 3 times greater electricity costs to operate than VHF stations.[1219] UHF stations also require more expensive transmitters than VHF stations.[1220] These factors, along with the signal coverage disparity, appear to diminish the ability of UHF stations to compete in the delivered video

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[1215] Letter from John R. Feore, Counsel for Paxson, to Marlene Dortch, Secretary, FCC (May 16, 2003) at Attachment 3.

[1216] *2001 Video Competition Report*, 17 FCC Rcd at 1282 ¶ 79.

[1217] 47 C.F.R. § 76.55(c)(3).

[1218] 47 C.F.R. § 76.66(g).

[1219] Letter from John R. Feore, Counsel for Paxson, to Marlene Dortch, Secretary, FCC (May 7, 2003) ("Paxson May 7, 2003 Ex Parte"), Attachment C at 11.

[1220] *Id.*

programming market. According to a 1997 study provided by Paxson, VHF affiliates of the top four broadcast networks had approximately 50% higher ratings than UHF affiliates of the top four networks.[1221] Paxson then replicated this study with 2002 ratings information and determined that the ratings disparity between UHF and VHF stations had actually *increased* between 1997 and 2002. Paxson's filing shows that, in November of 2002, network-affiliated VHF stations received approximately 57% higher ratings than network-affiliated UHF stations, compared with 50% in 1997.[1222] Thus, even after controlling for factors such as programming and market size, UHF stations continue to experience a competitive handicap compared with VHF stations. This disparity translates into reduced advertising revenues for UHF stations.[1223] Thus we disagree with UCC that the UHF handicap has largely been eliminated by greater cable and DBS carriage of UHF signals.[1224]

589. In addition to strengthening competition between UHF and VHF stations, the UHF discount promotes entry by new broadcast networks. Paxson asserts that UHF discount enhanced its ability to launch a new broadcast network because it could own more UHF stations than VHF stations. Paxson states that the additional ownership of stations permitted by the UHF discount provides a significant financial incentive for new networks to enter and compete with established networks.[1225]

[1221] Paxson May 7, 2003 Ex Parte, Attachment C at 9 (stating that VHF-based affiliates received a 9.6 prime time rating compared UHF affiliates' 6.4 rating).

[1222] Letter from John R. Feore, Counsel for Paxson, to Marlene Dortch, Secretary, FCC (May 30, 2003). Attachment at 2.

[1223] Fox May 20, 2003 Ex Parte, Declaration of Michael Ward, General Manager, WNCN(TV) (stating that advertisers routinely discount the prices paid for advertising on UHF stations versus VHF stations).

[1224] UCC Comments at 57-58.

[1225] Paxson May 7, 2003 Ex Parte, Attachment C at 18.

This is because ownership of stations, as opposed to affiliation with separately-owned stations, enables a network such as Paxson's to earn both national and local advertising revenues.[1226] Univision also states that the UHF discount has enabled it to enter the market with programming tailored to Hispanic audiences. Univision explains that its entry as a broadcast network is particularly beneficial to Hispanic audiences because they rely disproportionately on over-the-air broadcast channels.[1227]

590. Finally, we observe that the established broadcast networks generally have not sought to take advantage of the UHF discount to gain greater national reach through local stations. The four most established broadcast networks collectively own 67 stations, 12 of which are UHF stations.[1228] Instead of replacing their VHF stations with UHF stations and owning up to 70% national coverage, they have retained their VHF stations and sought elimination of the national ownership cap. By contrast, Paxson, a recent entrant into the broadcast network business, owns 61 stations, all of which are UHF.[1229] Absent the UHF discount, Paxson's audience reach would be 61.8% of the nation's television households. This data indicates that the UHF discount plays a meaningful role in encouraging entry of new broadcast networks into the market. For these reasons, we retain the UHF discount.

591. The Commission has previously said it will issue a notice of proposed rulemaking proposing a phased-in

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[1226] *Id.*

[1227] Univision Reply Comments at 6 (52.8% of Hispanic television households in the top 30 markets subscribe to cable television. This compares with 67.8% of U.S. households that subscribe to cable overall.). *See* OPP Working Paper 37 at 41.

[1228] *The Top 25 Station Groups*, BROADCASTING & CABLE, Apr. 7, 2003.

[1229] Paxson owns 61 stations, 60 of which belong to the PAX television network. Paxson also owns a station that is affiliated with ABC. *Id. See also* Paxson Comments at 2.

elimination of the discount when DTV transition is near completion.[1230] At this point, however, it is clear that the digital transition will largely eliminate the technical basis for the UHF discount because UHF and VHF signals will be substantially equalized. Therefore, we will sunset the application of the UHF discount for the stations owned by the top four broadcast networks (*i.e.*, CBS, NBC, ABC and Fox) as the digital transition is completed on a market by market basis. This sunset will apply unless, prior to that time, the Commission makes an affirmative determination that the public interest would be served by continuation of the discount beyond the digital transition. For all other networks and station group owners, we will continue to examine the extent of competitive disparity between UHF and VHF stations as well as the impact on the entry and viability of new broadcast networks. In a subsequent biennial review, we will determine whether to include stations owned by these other networks and station group owners in the sunset provision we have established for stations owned by the top four broadcast networks.

B. Dual Network Rule

592. The dual network rule provides: "A television broadcast station may affiliate with a person or entity that maintains two or more networks of television broadcast stations unless such dual or multiple networks are composed of two or more persons or entities that, on February 8, 1996, were 'networks' as defined in § 73.3613(a)(1) of the Commission's regulations (that is, ABC, CBS, Fox, and NBC)."[1231] Thus, the rule permits common ownership of multiple broadcast networks, but prohibits a merger between or among the "top-four" networks, *i.e.*, ABC, CBS, Fox, and NBC. In this *Order*, we conclude that the dual network rule is necessary in the public interest to promote competition and localism.

[1230] *1998 Biennial Review Report*, 15 FCC Rcd at 11079-80 ¶ 38.

[1231] 47 C.F.R. § 73.658(g).

1. Background

593. The original dual network rule, which prohibited any entity from maintaining more than a single radio network, was adopted over sixty years ago.[1232] The rule was later extended to television networks.[1233] The Commission believed that an entity that operated more than one network might preclude new networks from developing and affiliating with desirable stations because those stations might already be affiliated with the more powerful network entity.[1234] In addition, the Commission expressed concern that ownership of more than one network could give the owner too much market power.[1235] The rule, therefore, was intended to serve the Commission's competition and diversity goals.[1236]

594. In the 1996 Act, Congress directed the Commission to amend the rule,[1237] which it did, to permit common ownership of two or more broadcast networks, but not a merger among ABC, CBS, Fox, or NBC, or between one of these top-four

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[1232] 6 Fed. Reg. at 2282 (May 6, 1941).

[1233] *Amendment of Part 3 of the Commission's Rules*, 11 Fed. Reg. 33 (Jan. 1, 1946).

[1234] *1998 Biennial Review Report*, 15 FCC Rcd at 11095-96 ¶ 70.

[1235] *Id.*

[1236] *Id.*

[1237] Section 202(e) of the 1996 Act directed the Commission to modify the dual network rule to prohibit a television station from affiliating with any entity that owns more than one of the four major networks (ABC, CBS, Fox, or NBC) or one of the four major networks and an emerging English-language network which, on the date of the 1996 Act's enactment, "provides 4 or more hours of programming per week on a national basis pursuant to network affiliation arrangements with local television broadcast stations in markets reaching more than 75 percent of television homes." 1996 Act, § 202(e). The legislative history of the "emerging network" provision indicated that it was intended to apply to only the UPN and WB television networks. *See* S. Rep. No. 230, 104th Cong., 2d Sess. at 163.

networks and UPN or WB.[1238] In 2001, the Commission further modified the rule to permit a top-four network to merge with or acquire UPN or WB.[1239] The Commission found that: (1) competition in the national advertising market would not be harmed; (2) greater vertical integration was potentially an efficient, pro-competitive response to increasing competition in the video market; and (3) program diversity would not be harmed because the two combined networks would have economic incentives to diversify their program offerings.[1240]

595. The restrictions in the current rule apply only to combinations of the top-four networks. All existing network organizations, and all new network organizations, may create and maintain multiple broadcast networks. Thus, the current rule permits common ownership of multiple broadcast networks created through internal growth and new entry.

596. Although the dual network rule gives all network organizations the opportunity to pursue any economic efficiencies that may arise from the maintenance of multiple broadcast networks, it restricts the manner in which specific network organizations may operate multiple broadcast networks. Specifically, the rule permits ABC, CBS, Fox, and NBC to develop multiple broadcast networks by: (1) creating new broadcast networks; (2) acquiring new broadcast networks; or (3) acquiring video networks from non-broadcast media (*e.g.*, cable or satellite) and migrating them to broadcast networks. However, the rule prohibits ABC, CBS, Fox, and NBC from developing multiple broadcast networks by merging with one another.

597. In the *Notice*, we sought comment on whether the present dual network rule is necessary in the public interest as the result of competition. We asked whether it promotes the

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[1238] *See* note 1065, *supra*.

[1239] *Dual Network Order supra* note 97.

[1240] *Id.* at 11124-25, 31 ¶¶ 24-25, 37.

goals of competition, diversity, or localism. We further asked whether, if the rule serves some of our purposes and disserves others, the balance of its effects argue for keeping, modifying, or abolishing the dual network rule.[1241]

598. Despite the voluminous record developed in this proceeding, few commenters addressed the dual network rule.[1242] Several commenters assert that the top-four networks are unique in that they regularly compete against each other for viewers (*i.e.*, their programming is targeted at similar national audiences, as opposed to the niche audiences smaller broadcast networks and cable networks target), that they each consistently generate the largest national audiences for their programming (thereby receiving the most advertising revenue, which, in turn, provides the funding to purchase the most desired programming), and that competition would be harmed by allowing any of them to merge.[1243] Several commenters also assert that concentration of ownership in the top-four networks would result in harms to diversity by providing fewer national and local viewpoints in news reporting and fewer programming choices for viewers.[1244] One commenter also argues that localism would be harmed by a top-four network merger because the merger would increase the economic leverage the networks have over their affiliates.[1245] The sole commenter arguing for elimination of the rule, Fox, asserts that competition

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[1241] *Notice*, 17 FCC Rcd at 18552-53 ¶ 159.

[1242] Those specifically mentioning the dual network rule in their comments are: AFL-CIO; AFTRA; CCC; Children Now; CWA; Fox; NAB/NASA; Smith; Stapleton; UCC; and Writers Guild. Of these eleven commenters, five devoted one paragraph or less to a discussion of the rule.

[1243] *See* CCC Comments at 17; NAB/NASA Comments at 73-74, 77; Stapleton Comments at 16; Writers Guild, *et al.* Comments at 16.

[1244] *See* AFL-CIO Comments at 63-64; AFTRA Comments at 36-38; CCC Comments at 18-19; UCC, *et al.* Comments at 59-60; Writers Guild, *et al.* Comments at 14.

[1245] *See* NAB/NASA Comments at 75-76.

will not be harmed because consumers have access to a vast array of other media outlets, that diversity will be maintained because common network ownership provides incentives to produce a diverse schedule of programming, and that localism will not be affected because stations have strong financial incentives to provide local programming regardless of their network affiliation.[1246] We analyze these arguments below in discussing whether the rule is necessary in the public interest as the result of competition.[1247]

2. Discussion

599. Under Section 202(h), we consider whether the dual network rule continues to be "necessary in the public interest as the result of competition." In determining whether the rule meets this standard, we consider whether the rule promotes competition, localism, and diversity. We conclude that the dual network rule continues to be necessary in the public interest to promote competition and localism.

a. Competition

600. We begin by summarizing the complex roles played by broadcast networks. Broadcast networks acquire a collection of programs from program producers. The programs are selected based on their ability to attract audiences that can be sold to advertisers. These programs - with advertisements embedded - are then made available to television audiences through the broadcast network's owned and operated broadcast television stations ("O&Os"), and also through contractual arrangements with affiliated broadcast television stations. Thus, a broadcast network serves many roles. It is an intermediary between local broadcast stations and advertisers and program producers.

[1246] *See* Fox Comments at 44-45, 47-48.

[1247] In its Comments, NAB/NASA states that "NAB takes no position on whether the Commission should retain the current version of the dual network rule." NAB/NASA Comments at 72; NAB/NASA Reply Comments at 57. The arguments opposing changes to the dual network rule are therefore made by NASA.

Because the top-four broadcast networks are participants in the program acquisition market and the national advertising market, mergers among them can affect competition in each of these markets.

601. Given the level of vertical integration of each of the top-four networks, as well as their continued operation as a "strategic group"[1248] in the national advertising market, a top-four network merger would give rise to competitive concerns that the merged firm would be able to reduce its program purchases and/or the price it pays for programming. As a result, we conclude that the dual network rule remains necessary in the public interest to foster competition.

(i) Program Acquisition Market

602. The top-four networks are the broadcasting components of vertically-integrated firms, which compete against each other to acquire programming that will attract the largest national audiences.[1249] Competition in the program acquisition market is important because networks compete with each other to acquire new, diverse, and innovative programming. A top-four network merger would give rise to competitive concerns that the merged firm would restrict the consumption of programming by using its market power to limit competitors' access to sources of programming. In addition, the merged network could use its market power to control the price it pays for programming or to raise competitors' costs of acquiring programming. In concentrated markets, viewers have access to

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[1248] A strategic group refers to a cluster of independent firms within an industry that pursue similar business strategies. *See* footnote 1262, *infra*, for a discussion of strategic groups.

[1249] ABC (a broadcast network) is vertically integrated with Disney (a program supplier); CBS (a broadcast network) is vertically integrated with Viacom (a program supplier); Fox (a broadcast network) is vertically integrated with News Corp and 20th Century Fox (a program supplier); and NBC (a broadcast network) is vertically integrated with NBC Entertainment's subsidiary NBC Studios (a program supplier).

fewer programming choices if the number of national, independent purchasers of programming decreases due to limited access to programming and higher programming costs.

603. NASA argues that a merger of two or more of the top-four networks would result in a less competitive program acquisition market, evidenced by lower output, fewer choices, and less technological progress.[1250] CCC argues that the top-four networks represent a distinct and important resource for viewers because only they are able to consistently distribute both news and entertainment programming to a mass audience, using their cable subsidiaries and local broadcast affiliates.[1251] Fox, on the other hand, argues that the rule actually undermines the Commission's competition policy by discouraging broadcast investment to the detriment of consumers of free over-the-air television.[1252] Fox also argues that the program acquisition market is only moderately concentrated, having an HHI of approximately 1120.[1253] In support of this argument, Fox asserts that the program acquisition market is characterized by a large number of purchasers of exhibition rights, including broadcast networks, broadcast stations, cable networks, DBS operators, premium cable networks, pay-per-view providers, and distributors of video cassettes and DVDs.[1254] NASA counters that the major broadcast networks do not compete with the cable networks for mass-audience, prime-time programs, and that the only avenue of distribution for such programs is the television broadcast networks.[1255] NASA therefore asserts that

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[1250] *See* NAB/NASA Comments at 58-60.

[1251] *See* CCC Comments at 17-18.

[1252] Fox Comments at 48.

[1253] Fox Economic Study E at 1. Fox economists excluded expenditures on news and sports programming because most of the inputs used in creating such programs are not readily substitutable with the inputs used in creating entertainment television programs and theatrical films.

[1254] *Id.*

[1255] NAB/NASA Reply Comments at 57. By NASA's estimate, which is

only the major broadcasting networks should be considered in an analysis of concentration in the purchase of national video programming.[1256]

604. We agree with Fox and NASA that the context for analyzing the program acquisition market is to consider the shares of expenditures on video entertainment programming. We conclude, however, that a more accurate assay of the market includes the shares of broadcast networks, broadcast stations, basic cable networks, pay cable networks, and pay-per-view networks. We reject NASA's narrow definition because they provide no evidentiary reason to exclude other video programming purchasers and they dismiss the range of programming choices available to viewers over the air, via cable and via satellite. We do not agree with Fox's more expansive definition, specifically the inclusion of home video, as that requires additional action on the part of individual viewers, such as purchasing a DVD player, driving to a video rental store, and renting a DVD. We conclude that using broadcast networks, broadcast stations, basic cable networks, pay cable networks, and pay-per-view networks in our analysis accurately represents the market participants, and their role in delivering programming to large, passive audiences. In order to examine the effect of mergers among broadcast television networks subject to this rule, we can construct hypothetical merger scenarios, building on the scenario developed in the national cap section of this Order. In the absence of actual figures for the network companies' broadcast station expenditures, we can only examine the effects of mergers amongst the networks (i.e., without their complement of O&Os,

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based on an analysis of Fox's Economic Study E, Table E2, the top-four networks account for over 87 percent of programming expenditures by broadcasting networks, and the video entertainment program acquisition market has an HHI of approximately 2100, a result considered "highly concentrated" under the DOJ/FTC Merger Guidelines. *Id.*

[1256] *Id.*, citing its Comments at 74-75.

but including the cable networks they own). For the same reason, we can only calculate the change in the HHI, not the "base level" HHI. So, for example, if Fox merged with GE and Disney merged with Viacom, the HHI would increase by almost 767 points. Then, if these two companies merged with each other, the HHI would increase by 2,246 points. Either of these changes in the HHI would be scrutinized under DOJ Merger Guidelines. Since these networks own television stations, the change in the HHI would actually be higher than in these examples.

605. Accordingly, we conclude that a merger between or among any of the top-four networks would harm competition in the program acquisition market. As noted, we determine in our analysis of the national ownership cap that an increase in the cap would not harm the program acquisition market, principally because networks would be enhancing their owned and operated distribution base. Our analysis of a merger between two or more of the top-four broadcast networks, however, indicates a significant potential for harm to this market. In addition to acquiring an entire group of owned and operated stations and all of the affiliation agreements of the stations aligned with the network, a merger would also entail the acquisition of significant program purchasing power by the vertically integrated merging networks. The vertically integrated networks would limit competitors' access to programming by denying remaining networks access to the production output of the merged network.[1257] In addition the merged firm can raise the price paid by those competitors for programming created and produced by the merged network's program production assets. The rule, therefore, remains

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[1257] Currently, one network studio may produce programming that is ultimately purchased by another network. For example, Paramount, a subsidiary of Viacom, produces the long running NBC series "Frasier" and the NBC series "Ed." Also, in addition to producing shows for The WB network, Warner Brothers has produced shows for ABC ("The Drew Carey Show" and "George Lopez") and NBC ("ER" and "West Wing").

necessary to promote competition in the program acquisition market.

(ii) National Advertising Market

606. Networks sell national advertising by creating large national audiences for their programming and delivering those audiences to advertisers. Sellers in the national advertising market include national broadcast networks, cable networks, and syndicators. Network O&Os, network-affiliated stations, and independent stations sell national spot advertising time, which is advertising sold on a market-by-market basis to national advertisers. National spot advertising time provides a competitive alternative to national advertising time to a certain extent. These sellers compete against each other not only based on the price they charge for advertising spots, but also based on their ability to deliver the largest number of viewers to their advertisers. If a merger were to reduce competition for advertising dollars, networks would have less incentive to compete against each other for viewers, which would lead them to pay less attention to viewers' needs and to produce less varied, lower quality, and less innovative programming.

607. In our discussion above of the necessity of maintaining the national TV ownership rule,[1258] we conclude that the networks compete with each other and with cable networks for national advertising revenues and that the current ownership cap was not necessary to ensure competition in the national advertising market. However, while we find that the top-four networks do not possess market power today, that would change if two or more of them were to merge with each other. Moreover, as explained in the *Dual Network Order*, the top-four networks comprise a "strategic group" within the national advertising market.[1259] The top-four networks compete largely

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[1258] *See* Section VII(A), *supra*.

[1259] *Dual Network Order*, 16 FCC Rcd at 11122-23 ¶ 20. A strategic group refers to a cluster of independent firms within an industry that pursue similar business strategies. For example, the top-four networks supply their

among themselves for advertisers that seek to reach large, national, mass audiences – a significant portion of the national advertising market that provides the top-four networks with a significant portion of their profits. We therefore conclude that a merger of two or more of the top-four networks would substantially lessen competition in the national advertising market, especially within the strategic group,[1260] with the concomitant harm to viewers described above.

608. The recent growth of cable and DBS does not alter our conclusion. Despite that growth, the top-four networks continue to provide the greatest reach of any medium of mass communications. The top-four networks attract much larger prime-time audiences in relation to advertisement-supported

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affiliated local stations with programming intended to attract mass audiences and advertisers that want to reach such large, nationwide audiences. By contrast, the emerging networks target more specialized, niche audiences similar to cable television networks. The conceptual basis for a strategic group is developed in R. E. Caves and M. E. Porter, *From Entry Barriers to Mobility Barriers: Conjectural Decisions and Contrived Deterrence to New Competition*, Q J ECON 91 (May 1977): 241-261. *Also see* Michael E. Porter, COMPETITIVE STRATEGY: TECHNIQUES FOR ANALYZING INDUSTRIES AND COMPETITION (New York: The Free Press, 1980), Ch. 7. For additional references on the application of the strategic group concept, see F. M. Scherer and David Ross, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE, (3rd ed.) (Boston: Houghton Mifflin, 1990) at 284-85. When properly applied, the concept of a strategic group ordinarily implies that only a relatively few firms will be included within its boundaries so that competitive rivalry will be oligopolistic in nature, although the number of firms actually populating the industry aggregated over all strategic groups may be quite numerous.

[1260] Our analysis suggests that economic concentration within the strategic group for 2001, as measured by the HHI, is 2646. This is based on advertising revenue and on shares of the top-four broadcast networks as reported by Richard Bilotti, *supra* note 1106. Any HHI above 1800 indicates a "highly concentrated" market. *See DOJ/FTC Merger Guidelines.* A merger between two or more of the top-four networks would produce a change in the HHI of over 100 points, which, according to DOJ guidelines, is an indication that such a merger should be reviewed to ensure that it would not enhance market power or facilitate its exercise. *Id.*

cable networks.[1261] Broadcasting's percentage share of advertising revenue continues to exceed its percentage share of viewing.[1262] Moreover, despite a decrease in audience share, the top-four networks continue to command increases in advertising rates, a further testament to the strength of broadcasting television as an advertising medium.[1263]

609. We agree with NASA that despite the emergence of new media on cable, DBS, and the Internet, the top-four broadcast networks still have the largest concentration of viewers and television economic power.[1264] A recent survey shows that each of the top twenty-five prime-time broadcast programs during the week of December 9-15, 2002, all of which were aired by CBS, ABC, NBC, or Fox, achieved considerably higher household ratings than any of the 25 highest ranked cable programs.[1265] The highest-ranked

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[1261] For example, during the month of February, 2003 (1/27/03 – 2/23/03), CBS, NBC, ABC, and Fox delivered prime-time household ratings of 8.9, 8.1, 6.7, and 6.7, respectively, as compared to the top advertiser-supported cable network, TNT, which garnered a 1.8 share rating. (A rating point is equal to 1.067 million households.) *See* Television Bureau of Advertising, Viewer Track, *Monthly Broadcast vs. Cable Primetime Ratings: Feb-2003 vs. Feb-2002*, at http://www.tvb.org/rcentral/viewertrack/monthly/mon-b-c/mon-b-c.asp?ms=Feb-2003_vs_Feb-2002.html (visited March 7, 2003).

[1262] *See e.g.*, NAB/NASA Comments at 13, stating that broadcasting's share of advertising revenue in 2001 was 71.5% whereas its audience share stood at 53.7%. In addition, the networks have been able to increase the quantity of advertising availabilities for sale by adding more commercial minutes per hour. *Id.*

[1263] The networks have raised prices for advertising on a cost per thousand ("CPM") viewers basis steadily. Prime-time broadcast network CPMs have increased from $9.74 in 1990 to $13.42 in 2000, an average annual growth rate of 3.8%. *See* OPP Working Paper 37 at 28. In addition, an advertising industry compilation indicates that the top-four commercial networks increased hourly commercial minutes by 16.4% from 1991 to 2000, from an average of seven minutes and 47 seconds to an average of nine minutes and three seconds. *Id.*

[1264] NAB/NASA Comments at 74.

[1265] *Id.*, citing Television Bureau of Advertising, Inc., Viewer Track, *Top 25*

broadcast program had a rating larger than the top five cable programs' ratings combined.[1266] We also agree that as it becomes more difficult to reach a large number of viewers, television broadcasters that can still deliver a mass audience become more valuable.[1267]

610. We further conclude, as we did in the *Dual Network Order*, that obtaining a sufficient number of affiliated stations remains a major obstacle to developing a new broadcast network capable of attracting national advertisers seeking to reach a mass audience.[1268] As long as mobility barriers[1269] deter entry into the major network strategic group, the pricing of network advertising will be sensitive to the number of network competitors.[1270] We therefore conclude that the current dual network rule is necessary to maintain competition in national advertising market.

b. Localism

611. We conclude that the dual network rule also is necessary to retain the balance of bargaining power between the

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Programs on Broadcast and Cable: Week Ending Dec. 15, 2002, at http://www.tvb.org/rcentral/index.html (visited Jan. 1, 2003).

[1266] *Id.*, citing also its earlier notes 34-35 and accompanying text (observing that 99 of the 100 top-rated prime-time programs are broadcast programs, and that the combined average viewership for the four major broadcast networks is almost six times as high as that of the top ten ad-supported cable networks).

[1267] *See* NAB/NASA Comments at 75.

[1268] *Dual Network Order*, 16 FCC Rcd at 11123 ¶ 20. *See also* NAB/NASA Comments at 73.

[1269] Mobility barriers are barriers to entry that deter the movement of a firm *within* a given industry from shifting from one strategic group to another. Different strategic groups will be defended by different mobility barriers that vary in their effectiveness in restricting entry into a given strategic group. In general, firms protected by high mobility barriers will have greater profit potential than firms in other strategic groups protected by low mobility barriers.

[1270] *See also* NAB/NASA Comments at 75.

top-four networks and their affiliates. As noted in the national TV ownership rule section, we conclude that affiliates play an important role in assuring that the needs and tastes of local viewers are served.[1271] Elimination of the dual network rule would harm localism by providing the top-four networks with increased economic leverage over their affiliates, thereby diminishing the ability of the affiliates to serve their communities.[1272]

612. The top-four networks have an economic incentive to promote the widest distribution nationwide of the programming that they produce and to assure that it is carried simultaneously across the country. To reach the most viewers, the top-four networks acquire their own stations ("O&Os"), usually in the largest television markets, and enter into affiliation agreements with station owners throughout the remainder of the country. Through affiliation, the networks benefit from the wide-area delivery of their programming. Network affiliates benefit, in turn, by gaining access to high-quality programming.

613. Affiliates have an economic incentive to tailor their programming to their local audiences. Affiliates can influence network programming decisions by joining forces with other network affiliates in collective negotiations to ensure that the programming provided by the network serves local needs and interests. The strength of an affiliate's influence with its network lies in its power as part of a "critical mass" to join forces with other network affiliates in collective negotiations to try to influence network programming.[1273] On an individual basis, affiliates may also decide to preempt network programming if other programming is available that better suits local needs.

[1271] *See* Section VII(A), *supra*.

[1272] *See id.* for a discussion of localism and its importance in the balance of power between networks and their affiliates.

[1273] NAB/NASA Comments at 2-3.

614. As noted by NASA, because of the costs of programming and promotional expenses, network affiliation remains critical for the economic survival of most local television stations.[1274] NASA argues that if the dual network rule were eliminated, a top-four network merger would result in the networks gaining an unfair advantage over their affiliates, noting that a merger would reduce alternative choices of program providers for affiliates as the number of network owners decreases.[1275] As an example, NASA notes that if NBC and CBS were permitted to merge, a terminated CBS affiliate would no longer be able to turn to NBC for affiliation.[1276] The harm would be exacerbated if more than two of the top-four networks were to combine.

615. We agree with NASA that a top-four network merger would harm localism by providing the networks with undue economic leverage over their affiliates. While a top-four network merger may not result in fewer networks, it would result in fewer network *owners*. We conclude that a top-four network merger would reduce the ability of affiliates to bargain with their network for favorable terms of affiliation, and would result in less influence of affiliates on network programming. As the number of network owners declines, affiliates lose the ability to use the availability of other top independently-owned networks as a bargaining tool with their own networks. In the same way, a combined top-four network's increased leverage could be used to overwhelm affiliate bargaining power with respect to programming issues. A top-four network merger would lead to fewer alternatives for affiliates, which would lead to reduced bargaining power of affiliates, and less influence of affiliates on network programming, including the ability to preempt network programming that affiliates find to not serve

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[1274] *Id.*

[1275] *Id.* at 75-76.

[1276] *Id.*

their local communities. We therefore conclude that the dual network rule remains necessary to foster localism.

c. Diversity

616. In the *Notice*, we sought comment on the dual network rule's effect on program diversity and viewpoint diversity.[1277] As noted in the national TV ownership rule section, we conclude that the market for diversity is local, not national.[1278] As also noted, we conclude that viewpoint diversity is the most pertinent aspect of diversity for purposes of our ownership rules.[1279] Nevertheless, since several commenters argue that elimination of the dual network rule would result in a diminution of program diversity, we address their arguments.[1280]

617. Several commenters argue that elimination of the dual network rule would result in less diverse programming and that national viewpoints in news reporting would be diminished.[1281] AFL-CIO and AFTRA argue that recent mergers and consolidation in the industry have resulted in instances of reduced viewpoint diversity and program diversity in local markets.[1282] AFTRA also argues that elimination of the rule

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[1277] *Notice*, 17 FCC Rcd at 18553-54 ¶¶ 160-163.

[1278] *See* Section VII(A) *supra*.

[1279] *See id.*

[1280] *See* UCC Comments at 59-61; NAB/NASA Comments at 78; AFL-CIO Comments at 61-62; AFTRA Comments at 34; and CCC Comments at 19.

[1281] *See* CCC Comments at 19; UCC Comments at 59; AFL-CIO Comments at 61-62; AFTRA Comments at 34-35; and NAB/NASA Comments at 78.

[1282] AFL-CIO Comments at 61-62, gives the following as examples: Viacom in Philadelphia owns the local CBS and UPN television stations and KYW-AM radio, and has assigned radio anchors to produce news for UPN; Viacom in Detroit dropped its local CBS-TV news and has contracted WXYZ to produce its UPN-TV news; and NBC is combining its news operations with Telemundo. AFL-CIO further states that BET, which is now owned by Viacom, has cancelled several news-related and public affairs shows, and that NBC O&Os have begun to merge station operations with Paxson TV affiliates, only rebroadcasting NBC news on PAX stations. *See*

will quell new voices and diverse viewpoints, "as emerging networks are quashed in favor of more 'cost-effective' means of delivering content."[1283] CCC argues that because CBS is "repurposing" its original programming on UPN, diversity between the two networks is reduced.[1284] CCC also argues that WB, UPN, and the cable networks do not have the audience reach or the resources to fill the diversity void created if the national networks were reduced by elimination of the rule.[1285] Fox disagrees, arguing that the vast array of other media outlets will provide the public with sufficiently diverse information and views.[1286]

618. One commenter, UCC, argues that despite recent gains in the popularity of other forms of media, national broadcast television continues to be the public's most important source for national and international news.[1287] UCC argues that the average weekday reach of the evening newscasts of ABC, CBS and NBC is about 10 times the combined reach at 6:30 p.m. for Fox, CNN, CNN Headline News, MSNBC, and CNBC.[1288] Because network news on broadcast television is expensive to produce, UCC argues, a top-four network merger would result in the consolidation of news departments in order to achieve economic efficiency.[1289]

619. In the *Dual Network Order*, the Commission found that program diversity at the national level would not likely be harmed by the combination of an emerging network (*i.e.*, UPN or WB) with one of the top-four networks. The Commission

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also AFTRA Comments at 34-35.

[1283] AFTRA Comments at 34.

[1284] CCC Comments at 19.

[1285] *Id.* at 18.

[1286] Fox Comments at 44-45.

[1287] UCC Comments at 60.

[1288] *Id.* at 60 (citation omitted).

[1289] *Id.* at 60-61.

found it likely that a common owner would have strong incentives to produce a diverse schedule of programming for each set of local TV outlets in the same market.[1290] In this proceeding, we address possible combinations among only the top-four networks, which are distinct from combinations between a top-four network and an emerging network.[1291] Also, we find in this proceeding that the market for diversity is local, not national.[1292] Further, as noted in the Policy Goals section above, we find that program diversity is best achieved by reliance on competition among delivery systems rather than by government regulation.[1293]

620. We are unable to conclude that the dual network rule can be justified on program diversity or viewpoint diversity grounds. Although we received conjectural statements regarding the repurposing of some programming, and stories of news operations being shared in a few markets, these reports do not evidence a systematic reduction in diversity as a result of

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[1290] *Dual Network Order*, 16 FCC Rcd at 11131 ¶ 37. Fox argues in this proceeding that a top-four network merger would result in the same incentives for the merged firm, and that all network outlets, regardless of ownership, will continue to pursue the elusive goal of divining audience tastes. Fox Comments at 45-47.

[1291] We agree with NAB/NASA that the Viacom/UPN (top-four network/emerging network) example cannot be extrapolated to a situation in which a top-four network takes over another one (with which it directly competes), because, as admitted by Viacom, CBS and UPN do not compete for the same viewers. *See* NAB/NASA Reply Comments at 59-60. NAB/NASA notes that in the 2001 Dual Network proceeding, Viacom argued that CBS did not really compete with UPN. Rather, it stated that its principal competition came from the broad-based traditional networks operated by ABC, NBC, and increasingly Fox. NAB/NASA Comments at 77, citing Viacom's Comments to the *Notice of Proposed Rulemaking* in MM Docket No. 00-108, 15 FCC Rcd 11253 (2000) at 22. *See also* Fox Comments at 46, where Viacom states that "CBS and UPN have set their sights on entirely different demographics."

[1292] *See* Section VII(A), *supra*.

[1293] *See* Section III(A)(2), ¶ 37, *supra*.

media mergers. The record provides no evidence that, because some stations share news operations, viewpoint diversity is diminished. Further, even if a merger among ABC, CBS, or NBC would result in the loss of one weekday evening newscast, a substantial number of outlets that report national/international news would remain to provide diverse viewpoints throughout the day to the public.[1294] Finally, to the extent that we consider programming diversity an issue, the record provides no evidence that the repurposing of programming on different networks results in a diminution of program diversity. In fact, we found in the *Dual Network Order* that the repurposing of programming between two merged networks was likely to produce net benefits to viewers of network television.[1295]

3. Conclusion

621. Given the level of vertical integration of each of the top-four networks, as well as their continued operation as a "strategic group" in the national advertising market, a top-four network merger would give rise to competitive concerns that the merged firm would be able to reduce its program purchases and/or the price it pays for programming. These competitive harms would, in turn, harm viewers through reductions in program output, program choices, program quality, and innovation. We further conclude that a top-four network merger would harm localism by providing the networks with undue economic leverage over their affiliates, reducing the ability of affiliates to bargain with their network for favorable terms of affiliation, giving the networks greater power in

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[1294] These outlets include cable news networks, daily and weekly newspapers, magazines, and the numerous news-related websites on the Internet. *See* Appendix B, listing all national news sources. In any event, we question the assumption that a merger among ABC, CBS, or NBC would result in the elimination of a news department, particularly considering that each network currently attracts a substantial number of viewers to its weekday evening newscast.

[1295] *See Dual Network Order*, 16 FCC Rcd at 11124-25 ¶ 24.

program selection, and diminishing alternative choices of programming for affiliates. As a result, we conclude that the dual network rule remains necessary in the public interest to foster competition and localism.

VIII. MISCELLANEOUS REQUESTS

622. Numerous parties submitted comments on issues not specifically raised in the *Notice*. As discussed below, we dismiss most of these requests on procedural grounds because they fall outside the scope of this proceeding. We do not review the merits of these requests. To the extent appropriate, parties are free to re-file these requests as petitions for rulemakings. We deny others for the reasons discussed herein.

A. Requests That Are Outside the Scope of the Proceeding

1. Proposed Behavioral Rules.

623. Several parties ask that we impose behavioral rules to achieve a number of alleged public interest goals. We invited comment in the *Notice* as to whether behavioral rules might render structural rules unnecessary to achieve our public interest goals of diversity, competition, and localism.[1296] The following proposals, however, relate to policy goals that are unrelated to those served by our structural rules and are therefore outside the scope of the *Notice*.

624. *TV Viewing*. TV Turnoff Network requests that we require all broadcast stations to run announcements reminding the viewing public that: (1) excessive television viewing has negative health, academic, and other consequences for children; and (2) parents and guardians retain and should exercise their First Amendment right and ability to turn off their television sets and limit their children's viewing time.[1297] We dismiss this request because it is outside the scope of this proceeding, which

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[1296] *Notice*, 17 FCC Rcd at 18520, 18521 ¶ 49.

[1297] TV-Turnoff Comments at 1-8.

reviews our structural broadcast ownership rules pursuant to Section 202(h). Indeed, the goals sought to be advanced by the proposal bear no relation to diversity, competition, or localism.

625. *PEG.* Alliance requests that we promulgate behavioral regulations that guarantee public, educational, and governmental ("PEG") access on cable and direct broadcast satellite ("DBS") to ensure diversity of voices. Alliance argues that such federal regulations are necessary because PEG access is not mandated by federal legislation, but rather derives from a statute that allows local communities to regulate it.[1298] We dismiss Alliance's request as outside the scope of this proceeding and our authority, generally. The Commission once had access requirements of the type suggested by Alliance, but the Supreme Court struck them down as beyond our statutory authority.[1299] Section 611 of the Act, as amended by the Cable Communications Policy Act of 1984, states that franchising authorities may require operators to designate channel capacity for public, educational and governmental access use as part of their franchise agreement.[1300] Congress did not authorize the Commission, however, to implement, enforce, or oversee the broad local access requirements advocated by Alliance.[1301] We note, however, that noncommercial educational television stations may request mandatory carriage on cable systems[1302] and also have satellite carriage rights in markets where DBS

[1298] Alliance Comments at 4-6. 47 U.S.C. § 542(c)(2).

[1299] *See FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (authority to compel cable operators to provide common carriage of public-originated transmissions must come specifically from Congress). *Id.* at 708.

[1300] 47 U.S.C. § 531.

[1301] Although DBS is required to set aside 4% of capacity for public interest ("non-commercial, educational, and informational") programming pursuant to Section 335 of the Act, we do not have authority to adopt the broader rights advocated. 47 U.S.C. § 335(b) and 47 C.F.R. 25.701.

[1302] 47 U.S.C. § 535.

provides local-into-local service pursuant to the "carry-one-carry-all" requirements under Section 338 of the Act.[1303]

626. *Payola.* Future of Music Coalition alleges that a new form of payola exists in which record companies pay independent promoters to ensure that the companies' records are played on the radio. The independent promoters, Future of Music Coalition alleges, then establish exclusive relationships with radio stations and pay these radio stations a large portion of the money received from the record companies in the form of "promotional expenses." Future of Music Coalition asks that we ban this practice, thereby promoting diversity in radio programming.[1304] We dismiss Future of Music Coalition's request because it is outside the scope of the *Notice* and this proceeding.

2. Ownership Issues Outside the Scope of the Proceeding.

627. Some parties request action regarding ownership or attribution issues that were not raised in the *Notice* and that are therefore outside the scope of the proceeding.[1305] We dismiss these requests.

628. *Alien Ownership.* CanWest suggests that our biennial review of media ownership rules and the multilateral trade in services negotiations underway in the World Trade Organization provide a timely occasion to review foreign ownership rules for broadcasting.[1306] We decline to undertake such a review because it would be outside the scope of this

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[1303] 47 U.S.C. § 338.

[1304] Future of Music Coalition Comments at 91-92.

[1305] We decline to engage in a far reaching inquiry into possible harms in markets that are outside the Commission's jurisdiction or outside the scope of this proceeding. *See, e.g.*, Jennifer Poole Comments at 1-2 (arguing that consolidation will lead to a loss of pay and benefits for editorial writers).

[1306] CanWest Comments at 8-10.

proceeding. Moreover, to the extent that our foreign ownership regulations are statutorily based,[1307] we do not have the discretion to modify or repeal them in the biennial review process, pursuant to Section 202(h).

629. *Attribution.* MMTC asks us to expand this proceeding to include review of the attribution rules.[1308] We deny this request because, as we stated in the *Notice*, the attribution limits are not properly reviewed in the biennial review process,[1309] except for review of radio joint sales agreements ("JSAs"), which we address in the Local Radio Ownership section above.[1310]

630. *LPFM.* REC Networks requests that we refrain from changing our Low Power FM ("LPFM") rules relating to ownership caps and assignment of stations because these rules are consistent with our intentions in establishing LPFM.[1311] LPFM ownership and assignment rules are addressed in Sections 73.855, 73.858, 73.860, and 73.865 of the Commission's rules, adopted in 2000,[1312] and are not addressed in the context of this proceeding. These are non-commercial

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[1307] 47 U.S.C. § 310.

[1308] MMTC Dec. 9, 2002 Comments at 4.

[1309] The attribution rules do not themselves prohibit or restrict ownership of interests in any entity, but rather determine what interests are cognizable under the ownership rules. The focus of the biennial review process is whether the ownership rules are necessary in the public interest as a result of competition. The attribution limits are set at the level the Commission believes conveys influence or control and, as these limits are not related to any changes in competitive forces, they are not reviewed biennially. *Notice* at n.13. *See 1998 Biennial NOI*, 13 FCC Rcd at 11280 ¶ 10.

[1310] As addressed more fully in our Local Radio Ownership section above, in 2001, we sought comment on whether JSAs should be attributable. *See Local Radio Ownership NPRM*, 16 FCC Rcd at 19894 ¶¶ 82, 83. That NPRM was incorporated into this proceeding.

[1311] REC Networks Comments at 2-4.

[1312] 47 C.F.R. §§ 73.855, 73.858, 73.860, 73.865. *See Creation of Low Power Radio Service*, 15 FCC Rcd 2205 (2000).

stations and therefore a consideration of ownership limits for these stations is outside the scope of this proceeding. REC also asks that we impose new ownership restrictions on non-commercial educational stations. We dismiss that request as such limits are outside the scope of this proceeding.

631. *Broadcast Auction Process.* Hodson recommends that we modify the new entrant bidding credit in the broadcast auction process from the current percentages of 25 percent and 35 percent to 30 percent and 45 percent. Hodson also recommends, in its proposed 30 percent tier, that we allow an attributable interest in five mass media facilities nationwide instead of the current three, with the condition that the winning bidder has no attributable interest in a broadcast presence already in the market the proposed broadcast station intends to serve. Finally, for entities eligible for Hodson's proposed 45 percent tier, Hodson recommends that we establish a relaxed payment plan for the winning bid balance that would include an extended payment schedule.[1313] Hodson's proposals go to our broadcast auction rules and process, not our ownership rules. These proposals are not a logical outgrowth of the *Notice* and they are therefore outside the scope of this proceeding.[1314]

[1313] Hodson Reply Comments at 75-81; Hodson IRFA Comments, MM Dkt. No. 01-317, MM Dkt. No. 00-244, Feb. 28, 2002 at VII.

[1314] We addressed the broadcast auction process in a prior rulemaking proceeding. In 1998, the Commission determined that it would fulfill its obligations under Section 309(j) of the Communications Act of 1934, 47 U.S.C § 309(j)(3)(B), to promote economic opportunity and competition for designated entities, including small businesses, by providing new entrant bidding credits. *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, First Report and Order*, 13 FCC Rcd 15920, 15992-97 (1998), *granted in part and denied in part*, 14 FCC Rcd 8724 (1999), *amended by* 14 FCC Rcd 14521 (1999). Changes to these bidding credits would require a separate rule making.

3. Translator/Spectrum Issues Outside the Scope.

632. REC also makes other requests involving our rules applying to use of translators. REC claims that the current rules allow distant translators and discourage establishment of new local LPFM stations.[1315] Nickolas Leggett asks that we provide alternative opportunities to small broadcasters including: (1) a frequency band for manually operated low-power commercial broadcasters; (2) a citizens broadcasting band; and (3) open-microphone neighborhood broadcasting supported by the consolidated broadcasters.[1316] We deny these requests that we change our translator rules or afford spectrum to small broadcasters because they are outside the scope of the proceeding.

B. Proposals Addressed in Other Commission Proceedings.

633. *Cable Ownership.* CCC requests that we retain our 30% national cable system ownership limits.[1317] We dismiss CCC's request because it is outside the scope of this proceeding and it relates to an issue that is the subject of a separate rulemaking.[1318]

634. *DTV.* USCCB asks us to promulgate regulations that define digital television ("DTV") broadcasters' public interest obligations.[1319] We dismiss USCCB's request because it is outside the scope of this proceeding. CST requests that we amend or eliminate any of our rules that hinder the digital conversion of broadcasters, cable systems, and telephone systems, and that we establish regulatory policies to encourage

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[1315] REC Networks Comments at 2-4.

[1316] Nickolas Leggett Oct. 28, 2002 Comments at 5.

[1317] CCC Comments at 24.

[1318] *See Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, 16 FCC Rcd 17312 (2001).

[1319] USCCB Reply Comments at 1-13.

the introduction of digital technologies.[1320] We dismiss CST's requests because they are outside the scope of this proceeding.[1321] Further, CST proposes that all broadcast licensees and cable systems that expand their operations as a result of rule relaxations be required to loan a percentage of their expansion revenues to a Digital Conversion Fund.[1322] We decline to adopt CST's proposal because there is no basis for the Commission to directly fund industry's transition to digital television. When Congress established the framework for the digital television transition in the Telecommunications Act of 1996, it gave no indication that the Commission should directly fund industry transition costs for digital television. Even if CST's proposal fell within Congress's directives, the establishment of such a fund raises extraordinarily complex and controversial issues such as the measurement by the Commission of 'merger efficiencies' and how the fund would be administered. CST provides us with no meaningful basis to assess the viability or effectiveness of such a program. Finally, as explained in Section VI above, the Commission already has considered the relationship between local television

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[1320] CST Reply Comments at 4-5.

[1321] The Commission is undertaking a second periodic review of the progress of the transition to DTV. *See Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 18 FCC Rcd 1279 (2003). This *Notice of Proposed Rulemaking* seeks additional comment from the public to refresh the record in three outstanding DTV public interest rulemaking proceedings: *Notice of Inquiry, Public Interest Obligations of TV Broadcast Licensees*, 14 FCC Rcd 21633 (1999); *Notice of Proposed Rule Making, Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, 15 FCC Rcd 19816 (2000); and *Notice of Proposed Rule Making, Children's Television Obligations of Digital Television Broadcasters*, 15 FCC Rcd 22946 (2000). The second DTV periodic review *Notice of Proposed Rule Making* also seeks comment on a large number of issues related to the progress of the DTV transition and steps the Commission could take to facilitate the transition.

[1322] CST Reply Comments at 7.

consolidation and the transition to digital television. We determined that the efficiencies from relaxing the local television ownership limit would likely promote the transition to digital television.

C. Requests That We Delay the Proceeding or Seek Further Information

635. Some parties ask us to undertake additional studies or delay taking action until after some future events.[1323] We decline to delay action in this proceeding. Our statutory obligation is to review the rules biennially; we have no discretion to willfully deviate from that schedule.

636. *IBOC-DAB*. VCPP requests that there be no relaxation on ownership restrictions until several years after 100% rollout of In Band On Channel Digital Audio Broadcasting ("IBOC-DAB"), arguing that this technology will destroy competition.[1324] We deny VCPP's request. The courts require us to base our ownership decisions on today's marketplace and

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[1323] MMTC filed a motion requesting that we postpone our vote on this *Order*. MMTC argues that because our Electronic Comment Filing System ("ECFS") was overloaded with filings immediately prior to our June 2, 2003 vote, the record does not accurately reflect all comments received in this proceeding and, therefore, parties are unable to respond to the complete record. MMTC Motion for a Brief Postponement of the Vote (May 31, 2003). We deny the motion. The Reply Comment period closed Feb. 3, 2003, more than four months ago. Nonetheless, in the interests of assembling a full record, the Commission has continued to accept comments, and more than 500,000 comments were filed in this proceeding, many of which were filed at the last minute. Given the large volume of last minute filings, it is inevitable that a small percentage would not be placed on our ECFS system or be available in the public reference room in sufficient time for replies. Nonetheless, the record is complete, and MMTC's failure to file its comments or requests in a timely fashion is no excuse to delay the proceeding. Nickolas Leggett asks us to engage in detailed political science analysis of the impact of removal of ownership caps on the legitimacy of government and business. Nickolas Leggett Nov. 15, 2002 Comments at 4. We deny this request because it is unclear.

[1324] VCPP Comments at 1-2.

the facts presently before us. We are not free to adopt a "wait and see" approach.[1325] The impact of IBOC-DAB on diversity, competition, and localism in local media markets will be accounted for in future biennial reviews.

637. SBA asks us to issue a Further Notice of Proposed Rulemaking in this proceeding, claiming the *Notice* is not specific enough to comply with the Administrative Procedure Act or the Regulatory Flexibility Act.[1326] We disagree with SBA and deny its request. Contrary to the implication of SBA, the actual rules at issue in this proceeding are specifically identified in the *Notice* and well known to all interested parties – they are our current broadcast ownership rules. Congress has directed us to review those rules every two years to determine whether those exact rules remain necessary in the public interest. That we have done in this proceeding in accordance with the *Notice*. Further, Congress directed the Commission to eliminate or modify any of its broadcast ownership rules that no longer are necessary. Again, it was explicit in the *Notice* that we might eliminate any rule that could not be justified in light of the current media marketplace. To the extent that we have eliminated rules herein, therefore, there has been no failure of notice. With respect to those rules that, having been found unnecessary, have been modified herein, the question is the familiar one – were the modifications a "logical outgrowth" of the issues identified in the *Notice*. We conclude that this *Order* and its accompanying rules are a logical outgrowth of the questions posed in the *Notice*. The modifications made herein are consistent with the issues and questions posed in the *Notice*, and take account of the full record in this proceeding. Finally, we take seriously the mandate of Section 202(h) to review our broadcast ownership rules every two years. It would be impractical to complete such a Herculean task, in this case, to

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[1325] *Fox Television*, 280 F.3d at 1042.

[1326] SBA March 13, 2002 Comments at 2-5; SBA April 9, 2003 Comments at 3-5.

review six different rules, and to complete that review in time to start another review, if we issued a separate notice detailing modifications to rules and initiated another comment period.

638. Children Now asks that we reserve our decision-making on media ownership until its research on the effects of media consolidation on children is complete and can be incorporated into our record.[1327] Laura Smith requests that we expand the scope of our public hearings on media ownership and that we conduct additional research before concluding this proceeding.[1328] We decline to further delay this proceeding. The public, industry, and government agencies alike have an interest in finality, economy, and the avoidance of unnecessary delay. The public is not served by bureaucratic inaction; industries suffer when rules that restrain behavior without cause continue in force; and agencies fail in their responsibility when they commit public resources to meaningless exercises of no decisional significance. As a corollary, agencies should not refrain from acting on an issue once a robust record has been developed. It is the agency's responsibility, in the first instance, to determine when that point has been reached.[1329]

639. In this case, we see no overriding need to augment the record, nor do we believe that the expenditure of additional time and resources in an effort to do so will provide us with a

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[1327] Children Now Comments at 1-2. Also, on May 21, 2003, Children Now issued a study finding that, in the Los Angeles, California DMA, the number of hours of children's programming aired by television broadcast stations decreased by more than 50% between 1998 and 2003, and that the largest decreases in programming hours occurred at commonly owned stations. *See* Section VI *supra* for a discussion. *Children Now Report* 2, 5-6, 9.

[1328] Laura Smith Reply Comments at 27-33.

[1329] *United States v. FCC*, 652 F.2d 72, 90-91 (D.C. Cir. 1980) (en banc) ("Someone must decide when enough data is enough. In the first instance that decision must be made by the Commission .... To allow others to force the Commission to conduct further evidentiary inquiry would be to arm interested parties with a potent instrument for delay.").

significantly more accurate or current assessment of the media markets. To the contrary, the record in the current proceeding is one of the most factually complete and thorough ever assembled in a Commission rulemaking. In addition, the court in *Fox Television* made it quite clear that regulatory delay in the biennial ownership review process is causing hardship to the parties and should not be tolerated.[1330] Accordingly, we deny the requests of Children Now and Laura Smith.[1331]

D. Independent Producers.

640. *Independent Production Rules.* The Coalition for Program Diversity ("CPD") asks us to take "content neutral action" by "adopting a 25% Independent Producer Rule that will insure [*sic*] that the prime time programming aired by the four networks is as diverse as possible."[1332] In a similar vein, the Writers' Guild of America ("WGA") proposes a requirement that broadcast and cable national program services purchase at least 50 percent of the entertainment for their prime time schedules from independent producers.[1333] In essence, CPD and WGA ask us to re-impose some version of our prior financial interest/syndication rules, first adopted by the Commission in 1970.[1334] We reject these requests (collectively, the "Fin/Syn Proposals").

641. To begin with, there is substantial doubt as to whether we have adequate notice to adopt the Fin/Syn Proposals. In the *Notice*, we invited comment on, among other issues, whether

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[1330] *Fox Television*, 280 F.3d at 1039 ("retention of the Rules in the interim significantly harms both the networks and Time Warner").

[1331] We address other requests of Children Now *supra*.

[1332] CPD Comments at i, 8-10, 34-37; Reply Comments of CPD at 9; *see also* Malla Pollack Comments at 2.

[1333] Joint Comments of Writers Guild of America, et al., at 3.

[1334] Ex Parte Filing of ABC, Disney, FOX, NBC, Viacom (Apr. 29, 2003) at 1 (referencing *Amendment of Part 73 of the Commission's Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting*, 23 F.C.C.2d 382 (1970)).

diversity could be better promoted by alternatives to structural regulation, such as behavioral requirements and, if so, what behavioral requirements would be recommended.[1335] The Commission also sought comment on whether "the effects of the 1996 change in the national ownership cap [can] be separated from the effects of the repeal of the fin/syn and [prime time access] rules?" The Commission asked commenters to identify those effects.[1336]

642. Although we invited comment as to whether we should, in lieu of structural rules, adopt behavioral rules to serve our public interest goals, we did not propose a re-imposition of the fin/syn rules, or anything related. The Fin/Syn Proposals, therefore, are not squarely within the four corners of our *Notice*. Moreover, to the extent that we asked general questions about the effect of the repeal of our former fin/syn rules, or whether some behavioral rules might obviate structural regulation, we did not intend, nor do we think the *Notice* can be fairly read to suggest, that a fin/syn overlay would or could substitute for structural regulation as a means of protecting our desiderata -- localism, competition, and diversity. Accordingly, we do not believe that the Fin/Syn Proposals are responsive to the *Notice*, or that the adoption of such rules could be thought to be a logical outgrowth of the *Notice*.

643. In any event, we are not inclined to adopt the Fyn/Syn Proposals. The original fin/syn rules prohibited a television network (defined at the time to include only ABC, NBC, and CBS) from syndicating television programming in the U.S., or from syndicating outside the U.S. programming for which it was not the sole producer, or from having any option or right to share in the revenues from domestic or foreign syndication. These rules also prohibited a network from acquiring any financial or proprietary right or interest in the exhibition,

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[1335] *Id.* ¶ 49.

[1336] *Id.* ¶ 141.

distribution, or other commercial use of television programming produced by someone other than the network for distribution on non-network stations.[1337] In 1983, the Commission proposed repealing the rules based on, *inter alia*: (i) a 44% increase in the number of TV stations available to the average viewer since 1970; (ii) the dramatic increase in the availability of cable television; and (iii) evidence of vigorous competition among the television networks.[1338]

644. In 1991, however, the Commission opted not to repeal the rules, but instead modified them. Among other things, the Commission imposed a new restriction on networks, which provided that "no more than 40 percent of a network's own prime-time entertainment schedule may consist of programs produced by the network itself."[1339] In 1992, the U.S. Court of Appeals for the Seventh Circuit vacated the rules.[1340] The Court criticized the Commission for not addressing earlier Commission findings, in 1983, that the networks lacked significant market power. The Court found that the development of cable, video recorders, and the advent of the Fox network buttressed the earlier findings.[1341]

645. In the proceedings on remand, the Commission decided to repeal, on a graduated basis, most of its fin/syn rules.[1342] In repealing the 40 percent cap, the Commission observed that the cap does not necessarily foster diversity.[1343] The Commission also noted that "the decline in network audience share, which

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[1337] *Schurz Communications, Inc*, 982 F.2d at 1045.

[1338] *Amendment of the Syndication and Financial Interest Rules*, 94 F.C.C.2d 1019, 1057-63 (1983).

[1339] *Schurz Communications*, 982 F.2d at 1046.

[1340] *Id.* at 1055.

[1341] *Id.* at 1046, 1053.

[1342] *Evaluation of the Syndication and Financial Interest Rules*, 8 FCC Rcd 3282 (1993).

[1343] *Id.* at 3299 ¶ 38.

largely explained the rule's relaxation in 1991, has continued unabated."[1344] On appeal, the Seventh Circuit affirmed that decision, stating that if the Commission ever decided to re-impose similar fin/syn restrictions on the networks, "it had better have an excellent, a compelling reason" to do so.[1345]

646. In 1995, the Commission removed the remaining fin/syn restrictions, finding that there was no "clear trend toward increased network ownership of [prime time entertainment programming] that is attributable to the relaxation of our fin/syn rules or that constitutes a cause for concern from a public interest standpoint."[1346] At the time, independent producers provided 80.97% of the prime time programming hours for ABC, CBS and NBC.[1347] Although there had been a decline in the number of packagers of programming included in the prime time schedules for ABC, CBS and NBC, the Commission believed that the decline could not be attributed to elimination of the fin/syn rules, but was "instead attributable to the inherent riskiness of prime time programming."[1348] Moreover, ABC, CBS, and NBC faced more, rather than less, competition in broadcast television due to the emergence of FOX and two additional broadcast networks (United Paramount and Warner Brothers).[1349] The Commission also reaffirmed its finding in 1993 that alternative video delivery systems, such as DBS and wireless cable, provided sufficient competition to the broadcast networks to obviate fin/syn restrictions.[1350]

[1344] *Id.* at 3303 ¶ 44.

[1345] *Capital Cities/ABC, Inc. v. FCC*, 29 F.3d 309, 316 (7th Cir. 1994).

[1346] *Review of the Syndication and Financial Interest Rules*, 10 FCC Rcd 12165 ¶ 21 (1995).

[1347] *Id.*

[1348] *Id.* at 12169 ¶ 20.

[1349] *Id.* at 12170 ¶ 26.

[1350] *Id.* at 12171 ¶ 27.

647. CPD now argues that, despite the growth of cable and DBS providers in the video programming distribution market, there still is a strong public interest supporting limitations on network programming because 43 million consumers receive only broadcast network television.[1351] CPD also points out that in 1992, 66.4 percent of the networks' prime time schedule consisted of programs produced and owned by independent producers. Today, they argue, only 24 percent of the four largest networks' prime time schedule is supplied by independent producers.[1352] CPD argues that the Commission should preserve 25 percent of the networks' prime time schedule for independent producers.

648. WGA asks that the Commission "adopt measures designed to insure [*sic*] that national program services on broadcast and cable television purchase at least 50% of their prime time programming from independent producers."[1353] WGA contends that consolidation in the market for video programming makes any appearance of diversity a mirage. Although there are 230 national cable programming networks, according to WGA, there are just 91 networks that can be considered major networks (defined by WGA as available in more than 16 million homes). Of these 91 networks, 80 percent (73) are owned or co-owned by 6 entities: AOL Time Warner, Viacom, Liberty Media, NBC, Disney and News Corporation.[1354]

649. Four major networks (ABC, CBS, FOX, and NBC, collectively the "Networks") filed a joint ex parte pleading opposing any cap on the amount of network programming a network may air during prime time. The Networks invoke much of the rationale that the Seventh Circuit used when it

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[1351] CPD Reply Comments at 2.

[1352] *Id.* at 4.

[1353] WGA Comments at 3.

[1354] *Id.* at 10.

vacated the Commission's prior fin/syn rules.[1355] To those arguments, the Networks add that the broadcast networks' prime time audience share has dropped from 72 percent in 1993-1994 to 58.9 in 2001-2002.[1356] The Networks assert that CPD's argument ignores the fact that, whereas there were only three broadcast networks in 1970 when the Commission first adopted the fin/syn rules, there are now seven networks providing English language programming.[1357] The Networks also argue that the growth in use of the DVD player, personal video recorder, and the Internet continues to add to the diversity in video programming and continues to undermine any rationale for fin/syn rules.[1358] Even accepting WGA's assertion that six companies own many of the major cable networks, the Networks argue that the market for video programming is more diverse today because six is double the number of companies that owned broadcast networks when the fin/syn rules were adopted.[1359]

650. Although CPD and WGA appear to be correct that fewer of the programs in the Networks' prime-time lineup are produced by independent producers than at times in the past, the evidence in the record does not address whether the decline in the number of independently-produced programs is attributable to changes in the regulatory environment (*i.e.*, the elimination of the fin/syn rules) or to other changes that have taken place in the media business in the intervening years that have increased the risk of producing prime time programming.[1360]

[1355] ABC, NBC, Disney, Fox and Viacom Apr. 29, 2003 Ex Parte at 2-3.

[1356] *Id.* at 2-5.

[1357] *Id.* at 2-8.

[1358] *Id.* at 2-7.

[1359] *Id.*

[1360] "Whatever the pros and cons of the original financial interest and syndication rules, in the years since they were promulgated the structure of

651. Moreover, the reduction in independently produced prime time programming on a small subset of television networks is not, by itself, a public interest harm. Our concern is to promote the interests of consumers and viewers, not to protect the financial interests of independent producers. The record does not demonstrate that consumers and viewers are harmed as a result of network financial interests in the programming they carry, particularly in light of the quantity and variety of media outlets for programming in today's media marketplace.

652. In particular, the record does not convince us that an "access" rule for independent producers will advance viewpoint diversity. CPD's argument, for example, is premised on the notion that the Networks are gatekeepers;[1361] if they are not, there are other outlets for independently-produced fare and no basis to impose fin/syn restrictions. To the extent that the Networks actually are gatekeepers, however, fin/syn rules cannot logically advance viewpoint diversity because the Networks, as gatekeepers, can filter messages at the distribution stage just as they can at the production stage. Adopting the Fin/Syn Proposals, therefore, is not likely to promote viewpoint diversity.

653. Even if we were to adopt a broader definition of "diversity" to include general entertainment programming,[1362] a

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the television industry has changed profoundly." *Schurz Communications*, 982 F.2d at 1046. The Commission previously has questioned whether changes in the mix of programming on the prime time lineup can be attributed to regulatory changes or to business considerations. *See Review of the Syndication and Financial Interest Rules*, 10 FCC Rcd 12165 ¶ 20 (1995).

[1361] Ex Parte Filing of CPD (May 15, 2003) at 2.

[1362] Although CPD premised its proposal on the goals of promoting both source diversity and program diversity, its main arguments appear to be premised on a program diversity rationale. *See, e.g.*, CPD Reply Comments at 20 (arguing that its proposal would "substantially increase the possibility that more diverse genres of programming will emerge"). As discussed

gatekeeper at distribution still may filter unwanted programming whether or not the programming is produced in-house. For example, if a network were to decide that its prime time lineup should consist only of "reality programming," or that it should target a particular audience demographic, there is no reason to believe that it could not give effect to those plans with independently-produced programming as easily as it could with programming produced by itself or an affiliated company – it simply would make known its programming intent and allow independent producers to fill the void. The Fin/Syn Proposals, therefore, cannot be justified on grounds of programming diversity.

654. Both CPD and WGA also fail to justify their definitions of the relevant market for purposes of their proposals. CPD, for example, has targeted its proposal only at the four major broadcast networks, and only at their prime time schedule. However, aside from conclusory allegations that "the prime time television programming marketplace is a narrow, unique market,"[1363] CPD has provided no reason to exclude other video programming outlets and other day-times, were we inclined to adopt a fin/syn-like rule. Viewers today have more programming choices available to them over-the-air, through cable, satellite, or home video, than ever before.[1364] Indeed, WGA considers a much larger market for these purposes (although it, too, provides little in the way of support for its market definition), and other commenters have suggested that non-prime time broadcast hours should be included in any

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above, our core interest in this proceeding is in protecting viewpoint diversity; we generally rely upon market forces to deliver programming that will appeal to viewers.

[1363] CPD Comments at 3-4.

[1364] *See* Joint Comments, Bruce M. Owen and Michael G. Baumann, Economic Study E, *Concentration Among National Purchasers of Video Entertainment Programming*, at 2.

analysis relating to programming diversity.[1365] Lacking the foundation of a sustainable market definition, the Fin/Syn Proposals cannot stand.[1366]

655. Finally, to the extent that the Fin/Syn Proposals are based on an assertion that the quality of independently-produced entertainment programming is superior to that of the Networks,[1367] we find the record devoid of evidence to that effect.[1368] We have no means or methodology to measure the quality of entertainment programming, and were we to favor one type or genre of programming over another, we would run squarely into the teeth of the First Amendment.[1369] It is up to consumers and viewers to determine what programming they want to watch, and networks, as they compete for viewers, must be responsive to those demands. It is not for this agency to intervene in the decisions that determine the content of programming (absent obscenity or indecency concerns).

656. When the Seventh Circuit affirmed the Commission's decision repealing all of the fin/syn rules, it questioned whether the rules "ever had much basis" and cautioned that, if the Commission ever decided to re-impose similar restrictions, "it had better have an excellent, a compelling reason" to do so.[1370]

[1365] NASA Comments at 63-64 (arguing that the 35% national cap should be retained to promote programming diversity during non-prime time).

[1366] *See Review of the Syndication and Financial Interest Rules*, 10 FCC Rcd at 12171 ¶ 27 (concluding that the fin/syn rules focused too narrowly on the broadcast networks to the exclusion of other distribution channels).

[1367] *E.g.*, CPD Reply Comments at i, 6, 13; WGA Comments at 10.

[1368] *Cf.* MOWG Study No. 5, Program Diversity and the Program Selection Process on Broadcast Network Television by Mara Einstein (Sept. 2002).

[1369] To be considered content-neutral, regulations must have neutral means and ends. *See News America Publishing, Inc. v. FCC*, 844 F.2d 800 (D.C. Cir. 1988) (strict scrutiny applied to structural regulations that had a direct effect on content and viewpoint); *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354 (D.C. Cir. 1998) (invalidating EEO regulations under strict scrutiny to the extent that they would implicate programming content).

[1370] *Capital Cities/ABC, Inc. v. FCC*, 29 F.3d 309, 316 (7th Cir. 1994).

None appears on this record. Accordingly, we reject the Fin/Syn Proposals.[1371]

IX. NOTICE OF PROPOSED RULEMAKING

657. In the Local Radio Section of this *Order*, we replaced our current contour-overlap methodology for defining radio markets with a geography-based market definition. For areas of the country covered by Arbitron Metro markets, we adopted the Metro market as the relevant radio market for purposes of determining compliance with the local radio ownership rule. A significant portion of the country, however, is not covered by Metro markets. We initiate this rulemaking proceeding to define radio markets for those areas.

658. We seek comment on how to draw specific market boundaries in areas of the country not located in Arbitron Metros. What factors should we consider in grouping radio stations into markets? We propose that radio markets be county-based, as Arbitron Metros are. We seek comment on that proposal. In the western United States, counties are significantly larger. We seek comment on whether we should, like Arbitron, divide counties into separate radio markets in certain circumstances. We also propose that radio stations be assigned to radio markets based on the location of their communities of license. We seek comment on this proposal.

659. We seek comment on whether we should rely on any pre-existing market definitions in delineating radio markets for non-Metro areas. As indicated in the Local Radio Section, Arbitron traditionally has based its Metro definitions on the Metropolitan Area (MA) definitions developed by OMB. Should we also do the same for non-Metro areas? OMB recently released new MA definitions based on the results of

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[1371] Aside from the reasons enumerated above, we reject WGA's proposal because it is far from clear that the Commission has jurisdiction over the programming carried on cable networks.

the 2000 Census.[1372] The 935 new MAs, moreover, cover a greater portion of the country. Previously, MAs were defined only for urban areas with a population of 50,000.[1373] The new MA definitions cover areas with a population of 10,000 to 50,000 (known as Micropolitan Statistical Areas), which should greatly increase the number of radio stations located in MAs.[1374] If we rely on MAs, how should we address future changes to MA definitions, and the creation of a new, or the deletion of an existing, MA?[1375] In addition, even with the expanded reach of the new MAs, there will be areas that they do not cover. How should the radio market be defined in those areas if MAs are used? One possible method is to establish geographic markets based on the location, distribution, and density of populated areas.[1376] Because population clusters are likely to indicate areas of economic and social interaction, the location and distribution of the centers of population should give us a reasonable indicator of the boundaries of the relevant geographic market in which radio stations compete. Because the geographic areas involved generally will be low-density and rural areas of the country, moreover, we believe that population data could provide a fairly reliable and easily determinable

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[1372] See OMB - Bulletin No. 03-04, http://www.whitehouse.gov/omb/omb/bulletins/b03-04.html. In 2000, OMB revised its procedures for defining MAs. In addition, it adopted the more generic term Core Based Statistical Area (CBSA) to cover both traditional Metropolitan Areas and the new Micropolitan Statistical Areas. *See generally* Standards for Defining Metropolitan and Micropolitan Statistical Areas, 65 Fed. Reg. 82228 (2000). Although less accurate, we will use former term – i.e., MAs – to avoid confusion.

[1373] *See* U.S. Census Bureau, Cartographic Boundary Files, http://www.census.gov/geo/www/cob/ ma_metadata.html (visited May 30, 2003).

[1374] *See* 65 Fed. Reg. at 82236-37 for a detailed description of the standards OMB uses to define MAs.

[1375] See *id.* at 82237 for the rules governing future updates to MAs.

[1376] Population data is available over the Internet from the Census Bureau.

market definition. We seek comment on this and any other methods.

660. Another possibility is to treat Cellular Market Areas (CMAs) as the relevant geographic market for radio. CMAs were developed in the mid-1980s to be the geographic basis for licensing cellular spectrum. CMAs consist of MAs (as they were defined after the 1980 census) and Rural Service Areas (RSAs),[1377] which the Commission delineated for areas of the country not located in MAs.[1378] Although CMAs were not developed in the context of radio broadcasting, they were designed to follow "natural social and economic communities" through "multi-county groupings drawn along . . . county boundaries."[1379] Are CMAs a reasonable proxy for radio markets in non-Metro areas of the country? We seek comment on this issue.

661. For any market definition we establish, how should we address situations in which that market overlaps an Arbitron Metro. If we use MAs or CMAs, there will be existing areas of overlap. Even if we define radio markets around existing Arbitron Metros, Metro boundaries may change, or Arbitron may create or delete a Metro. We seek comment on how to address the possibility of a market overlap (or in the case of a deleted Metro, the possibility of an undefined market).

662. The goal of this rulemaking proceeding is to generate a map or a list of markets for radio stations across the entire country, using Arbitron Metros where available and a Commission-endorsed market definition everywhere else. We therefore encourage parties to use this opportunity to submit specific information that would assist is in properly delineating

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[1377] *See Amendment of the Commission's Rules for Rural Cellular Service*, 1985 WL 260366, FCC 85-646, ¶ 1 (rel. Dec. 17, 1985).

[1378] *Amendment of the Commission's Rules for Rural Cellular Service*, 60 Radio Reg. (P&F) 1029, ¶ 1 (1986).

[1379] *Id.* at ¶ 11.

the boundaries of the local radio markets in which they are interested.

663. *Comments and Reply Comments.* Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's rules,[1380] interested parties may file comments on the notice of proposed rulemaking on or before 30 days after date of publication in the *Federal Register*, and reply comments on or before 45 days after date of publication in the *Federal Register*. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998).

664. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket, which in this instance is MB Docket No. 03-130. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Vistronix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at

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[1380] 47 C.F.R. §§ 1.415 and 1.419.

this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

665. Parties must also serve either one copy of each filing via e-mail or two paper copies to Qualex International, Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C., 20554, telephone (202) 863-2893, facsimile (202) 863-2898, or e-mail at qualexint@aol.com. In addition, parties should serve one copy of each filing via email or one paper copy to Amy Brett, Media Bureau, 445 12th Street, S.W., 2-C134, Washington, D.C., 20554. Parties should serve one copy of each filing via email or five paper copies to Linda Senecal, 445 12th Street, S.W., 2-C438, Washington, D.C., 20554.

666. *Availability of Documents.* Comments, reply comments, and ex parte submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C. 20554. Persons with disabilities who need assistance in the FCC Reference Center may contact Bill Cline at (202) 418-0267, (202) 418-7365 TTY, or bcline@fcc.gov. These documents also will be available electronically at the Commission's Disabilities Issues Task Force web site: www.fcc.gov/dtf, and from the Commission's Electronic Comment Filing System. Documents are available electronically in ASCII text, Word 97, and Adobe Acrobat. Copies of filings in this proceeding may be obtained from Qualex International, Portals II, 445 12th Street, S.W., Room, CY-B402, Washington, D.C., 20554, telephone (202) 863-

2893, facsimile (202) 863-2898, or via e-mail at qualexint@aol.com. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at 202-418-0531 (voice), 202-418-7365 (TTY).

667. *Ex Parte Rules.* This proceeding will be treated as a "permit-but-disclose" proceeding, subject to the "permit-but-disclose" requirements under section 1.1206(b) of the Commission's rules.[1381] Ex parte presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, ex parte or otherwise, are generally prohibited. Persons making oral ex parte presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.[1382] Additional rules pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules. Parties submitting written ex parte presentations or summaries of oral ex parte presentations are urged to use the ECFS in accordance with the Commission rules discussed above. Parties filing paper ex parte submissions must file an original and one copy of each submission with the Commission's Secretary, Marlene H. Dortch, at the appropriate address as shown above for filings sent by either U.S. mail, overnight delivery, or hand or messenger delivery. Parties must also serve either one copy of each ex parte filing via e-mail or two paper copies to Qualex International, Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C., 20554, telephone (202) 863-2893, facsimile (202) 863-2898, or e-mail at qualexint@aol.com. In addition, parties should serve one copy of each ex parte filing via email

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[1381] 47 C.F.R. § 1.1206(b).

[1382] *See id.* § 1.1206(b)(2).

or one paper copy to Amy Brett, Media Bureau, 445 12th Street, S.W., 2-C134, Washington, D.C., 20554. Parties should serve one copy of each ex parte filing via email or five paper copies to Linda Senecal, 445 12th Street, S.W., 2-C438, Washington, D.C., 20554.

668. *Initial Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[1383] the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules considered in the *Notice of Proposed Rulemaking* initiated herein. The IRFA is set forth in Appendix I. Written public comments are requested on this IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the *Notice of Proposed Rulemaking*, and they should have a separate and distinct heading designating them as responses to the IRFA. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this *Notice of Proposed Rulemaking*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA), in accordance with the Regulatory Flexibility Act.[1384]

669. *Paperwork Reduction Act.* This *Notice of Proposed Rulemaking* contains modified information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection(s) contained in this proceeding.

[1383] *See* 5 U.S.C. § 603. The RFA, 5 U.S.C. § 601 *et. seq.*, has been amended by the *Small Business Regulatory Enforcement Fairness Act of 1996* ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996).

[1384] *See* 5 U.S.C. § 603(a).

670. *Authority*. This *Notice* is issued pursuant to authority contained in Sections 4(i), 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303, and 307, and Section 202(h) of the Telecommunications Act of 1996.

X. ADDITIONAL ADMINISTRATIVE MATTERS

PAPERWORK REDUCTION ACT

671. This *Order* contains both new and modified information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. They will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection(s) contained in this proceeding.

REGULATORY FLEXIBILITY ACT

672. Pursuant to the Regulatory Flexibility Act of 1980, as amended,[1385] the Commission's Final Regulatory Flexibility Act Analysis is contained Appendix G.

DOCUMENT AVAILABILITY

673. This document is available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, S.W., Room CY-A257, Washington, D.C. 20554. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 12th Street, S.W., Room CY-B402, Washington, D.C. 20554, telephone 202-863-2893, facsimile 202-863-2898, or via e-mail qualexint@aol.com. This document is available in accessible formats (computer diskettes, large print, audio recording, and Braille) to persons with disabilities by contacting Brian Millin in the Consumer &

[1385] *See* 5 U.S.C. § 604.

Governmental Affairs Bureau at 202-418-7426, TTY 202-418-7365, or at bmillin@fcc.gov.

XI. ORDERING CLAUSES

674. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1, 2(a), 4(i), 303, 307, 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 303, 307, 309, and 310 and section 202(h) of the Telecommunications Act of 1996, this *Report and Order* in MB Docket No. 02-277 and MM Docket Nos. 01-235, 01-317, and 00-244 IS ADOPTED.

675. IT IS FURTHER ORDERED that Part 73 of the Commission's Rules IS AMENDED as indicated in Appendix H.

676. IT IS FURTHER ORDERED that the Interim Policy set forth herein IS ADOPTED.

677. IT IS FURTHER ORDERED that the Motion for Revision of Procedural Dates, Expansion of the Scope of the Proceeding, and Inclusion of Additional Studies in the Record, filed on October 9, 2002 by Minority Media and Telecommunications Council and National Association of Black Owned Broadcasters, is DENIED in part and GRANTED in part to the extent described herein; the Motion to Bifurcate and Repeal, filed on March 11, 2003 by Media General, Inc., IS DISMISSED; and the Motion to Postpone, filed on May 31, 2003 by the Diversity and Competition Supporters, et al., IS DENIED.

678. IT IS FURTHER ORDERED, pursuant to the authority contained in sections 1, 2(a), 4(i), 303, 307, 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 303, 307, 309, and 310 and section 202(h) of the Telecommunications Act of 1996, that the ownership requirements and rules adopted in this *Report and Order* SHALL BECOME EFFECTIVE thirty (30) days after publication of the text or summary thereof in the Federal

Register, except for those rules and requirements involving Paperwork Reduction Act burdens, which SHALL BECOME EFFECTIVE immediately upon announcement in the Federal Register of OMB approval.

679. This action is taken pursuant to the authority contained in sections 1, 2(a), 4(i), 303, 307, 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 303, 307, 309, and 310 and section 202(h) of the Telecommunications Act of 1996. If any section, subsection, paragraph, sentence, clause or phrase of this *Report and Order* or the rules adopted herein is declared invalid for any reason, the remaining portions of this *Report and Order* and the rules adopted herein SHALL BE severable from the invalid part and SHALL REMAIN in full force and effect.

680. IT IS FURTHER ORDERED THAT the proceedings in MB Docket No. 02-277, MM Docket No. 01-235, MM Docket No. 01-317, and MM Docket No. 00-244 ARE TERMINATED.

681. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

682. IT IS FURTHER ORDERED that pursuant to the authority contained in sections 1, 2(a), 4(i), 303, 307, 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 303, 307, 309, and 310 and section 202(h) of the Telecommunications Act of 1996, this *Notice of Proposed Rule Making* in MB Docket No. 03-130 IS ADOPTED.

683. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this *Notice of Proposed*

Rule Making, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

PRESS STATEMENT OF CHAIRMAN MICHAEL POWELL

In the Matter of the 2002 Biennial Regulatory Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996.

Today, we complete the most exhaustive and comprehensive review of our broadcast ownership rules ever undertaken. We have done so, obligated by our statutory duty to review the rules biennially and prove those rules are "necessary in the public interest." The Court of Appeals has interpreted this standard as placing a high hurdle before the Commission for maintaining a given regulation, and made clear that failure to surmount that hurdle, based on a thorough record, must result in the rule's modification or elimination. This is an exceedingly difficult charge, but a critical one to fulfill if we hope to continue to promote the cherished values of diversity, localism and competition.

Over the past twenty months we have been working tirelessly towards achieving three critically important goals: (1) Reinstating legally enforceable broadcast ownership limits that promote diversity, localism and competition (replacing those that have been struck down by the courts); (2) Building modern rules that take proper account of the explosion of new media outlets for news, information and entertainment, rather than perpetuate the graying rules of a bygone black and white era; and (3) Striking a careful balance that does not unduly limit transactions that promote the public interest, while ensuring that no company can monopolize the medium. I am confident we succeed by today's Order.

This proceeding has been the subject of extraordinary public attention. It is right that it has been so, for the values these rules are intended to advance are critically important to a vibrant democracy. I have heard the concerns expressed by the

public about excessive consolidation. Though such generalized worries do not clearly suggest specific answers to the specific issues the Commission must address, they have introduced a note of caution in the choices we have made. Consequently, our decisions today—retaining the rule against networks merging, tightening the limits on radio ownership, and modifying, rather than eliminating, the remaining rules—are modest, albeit very significant changes.

I must punctuate one irreducible point: Keeping the rules exactly as they are, as some so stridently suggest, was not a viable option. Without today's surgery, the rules would assuredly meet a swift death. As the only member of this Commission here during the last biennial review, I watched first hand as we bent to political pressure and left many rules unchanged. Nearly all were rejected by the court because of our failure to apply the statute faithfully. I have been committed to not repeating that error, for I believe the stakes are perilously high. Leaving things unaltered, regardless of changes in the competitive landscape, is a course that only Congress can legitimately chart.

For these reasons, we have embraced a challenge unparalleled in the FCC's history. We collected a thorough record, analyzed our broadcast ownership rules from the ground up, and wrote rules that match the times. For the first time, we documented the state of the entire industry, empirically analyzed different transactions and their effect on our diversity goals, and—most importantly—sought the views of our citizens as to how they obtain their news and public affairs information, in an effort to craft rules consistent with the actual, rather than theoretical, viewing and listening patterns of Americans.

I am confident and proud of the job we have done. I believe that our actions will advance our diversity and localism goals and maintain a vigorously competitive environment.

I would like to express my deep appreciation to each of my colleagues for their tireless efforts over these past many

months. Commissioners Adelstein and Copps have organized numerous hearings throughout the country and deserve credit for bringing unprecedented public input to this proceeding. Commissioners Abernathy and Martin have been actively engaged in every step of the process and have contributed enormously to the Order before us today. I admire the genuine commitment of all four of my colleagues to serving the American public in this proceeding. And, finally, there are not enough words of commendation for the spectacular efforts of the men and women of the Media Bureau. Their dedication and commitment are in the finest traditions of public service.

SEPARATE STATEMENT OF COMMISSONER KATHLEEN Q. ABERNATHY

Re: 2002 Biennial Regulatory Review, Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act or 1996, Cross-ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets, Order and Further Notice of Proposed Rulemaking (adopted June 2, 2003).

Today the Commission faces another historic decision affecting free speech where it must decide whether to be guided by facts or by fears. For literally years, this Commission has struggled in a highly politicized environment through Democratic and Republican administrations to strike an appropriate balance in its media ownership rules. Many have argued that this proceeding is about the core of our democracy — and I agree. And nothing is more fundamental to democracy than following the rule of law as given to us by Congress and as interpreted by the courts. Our success will ultimately be judged not by a public relations assessment, but by the rigorous demands of judicial review. It is a heavy responsibility and I believe we have exercised it well.

I. LEGAL FRAMEWORK OF TODAY'S DECISION

I began my review of the FCC's media ownership rules with three inescapable realities: the Telecommunications Act of 1996, the judicial decisions interpreting it, and the U.S. Constitution.

First, the Act requires the Commission to conduct a review every two years to determine which of our broadcast ownership rules can be justified in the modern world of media. For those who want us to delay this proceeding, I cannot do it. In fact, we are already five months behind schedule and therefore unfaithful to congressional intent.

Second, judicial decisions in this area have struck down every broadcast ownership rule the courts have reviewed since the 1996 Act. Each time the courts found the FCC had failed to justify the limits it continued to place on broadcast ownership. For those who want the Commission to maintain all the rules in their current form, you are asking me to defy the federal courts. This I will not do.

Third, the First Amendment to the Constitution protects the rights of free speech and free press and tells me that, in my capacity as an FCC Commissioner, I cannot tell the American people what they should believe, what they should read, or what they should watch or listen to for their own good. Any restraint placed on broadcasters' free speech rights must be a reasonable means to further our public interest goals. The federal court opinions specifically tell me that any restrictions we place on ownership must be based on concrete evidence — not on fear and speculation about hypothetical media monopolies intent on exercising some type of Vulcan mind control over the American people.

Within these parameters, I want to emphasize that we have undertaken an enormous study of the reality of the modern broadcasting marketplace. We have accumulated a record of unprecedented breadth and depth, including hundreds of thousands of public comments, 12 independent studies, and testimony from a number of broadcast ownership hearings. Ken Ferree and the Media Bureau staff have invested countless hours in research and analysis.

II. OWNERSHIP RESTRICTIONS

Based on my review of the record, I am persuaded that several ownership limitations — in their current form or with some modifications — remain "necessary in the public interest"[1] to preserve competition, localism, and diversity.

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[1] Pub. L. No. 104-104, § 202(h), 110 Stat. 56 (1996); *see also* 47 U.S.C. § 161; Joint Statement of Chairman Michael K. Powell and Commissioner

These rules thus meet the legal standard demanded by Congress and the courts. Rules that do not meet this standard may not be retained.

First, in the process of retaining our current limits on ownership of radio stations, we have tightened our definition of radio markets to ensure that it more accurately reflects the level of competition in these markets. Second, our television ownership rules continue to maintain the prohibition of mergers among any of the top four networks. Third, for other matters such as restrictions on local television ownership, the national television cap, and our cross-ownership rules, we have preserved structural limitations in revised forms.[2] We have modified these restrictions because, not only do the former rules fail to promote competition, localism, and diversity, but they may actually be *harming* these goals. For example, the record has demonstrated that combinations of two television stations actually produce more local news. The record also demonstrates that newspaper-owned television stations provide more news and public affairs programming and receive more industry awards for such programming than unaffiliated stations. If we kept our existing rules unchanged, we would artificially restrict such benefits to local communities with no countervailing advantages. I emphasize that our restrictions are

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Kathleen Q. Abernathy in *2002 Biennial Regulatory Review*, FCC 02-342, GC Docket No. 02-390, (rel. March 14, 2003) (explaining that biennial review standard in section 11 and section 202(h) is best interpreted as requiring an affirmative justification of covered rules based on the same substantive standard that applies upon adoption of the rules in the first instance).

[2] While I would have preferred to address cross-media mergers in small to middle markets on a case-by-case basis, I support the decisions we reached in this Order. Indeed, bright-line rules have the benefit of providing more certainty to the marketplace and increase the transparency of our process.

grounded in actual evidence of harm, as required by the courts, not in merely hypothetical fears.[3]

III. FACTS AND FEARS

Those who oppose our decision will continue to fear a mythical media monopoly that will descend upon our media landscape without any regulatory review of its power. But the reality is that under today's order there will continue to be hundreds of pathways into the American home in the average American city or town. The reality is that we are continuing to impose a national television ownership cap in recognition of the important role affiliates play in promoting localism, competition, and diversity. The reality is that today's order will prevent media companies from owning more than one of the top four stations in a market and will similarly forbid consolidation to fewer than six voices in the markets serving the vast majority of Americans. Democracy and civic discourse were not dead in America when there were only three to four stations in most markets in the 1960s and 1970s, and they will surely not be dead in this century when there are, at a minimum, four to six independent broadcasters in most markets, plus hundreds of cable channels and unlimited Internet voices.

Those opposing today's order have also emphasized that four companies air the programming that is chosen by approximately 75 percent of viewers during prime time. To me, the critical fact is that these providers control no more than 25 percent of the broadcast and cable channels in the average home, even apart from the Internet and other pipelines. Given these other viewing options, I can only presume that this means that Americans are watching these providers because they

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[3] Moreover, the modification of these prophylactic rules does not strip us of our continuing obligation to review transfers of media licenses to ensure they are consistent with the public interest.

prefer their content, not because they lack alternatives. It would be anathema to the First Amendment to regulate media ownership in an effort to steer consumers toward other programming. By the same token, concerns about the degradation of broadcast content do not justify government manipulation of consumer choice. "Degradation" is just an elitist way of saying programming that one does not like. While I support adopting prophylactic regulations in the interest of ensuring that consumers have ample choice — as we have done today — I refuse to pour one ounce of cement to support a structure that dictates to the American people what they should watch, listen to, or think.

III. NEW INITIATIVES

The defining characteristic of today's decision is balance. As I have said, we have undertaken affirmative steps to retain limits on ownership where they can be shown by actual evidence to promote competition, localism, and diversity. We have resisted merely hypothetical fears. In the process of reaching this balance, we have also taken some additional steps.

First, I was concerned that allowing an entity to own more than one television station in a market could decrease the amount of children's educational and informational programming available to families in those communities. I did not want to see the amount and diversity of such programming diminished if stations that are commonly owned in the same market simply re-run the same shows on each station. Accordingly, I am pleased that we have clarified in this Order that commonly owned stations in a market must air distinct children's programming to comply with our rules.

Second, this Order also leads the Commission down a path of providing more opportunities for small businesses, many of which are minority- and woman-owned. The Order restricts transfers of most existing combinations that fall out of compliance with our new rules unless the purchaser is a small broadcaster. In doing so, we are creating new opportunities for

participation in broadcasting without threatening diversity or competition in these markets.

Third, I also am pleased that, as part of this decision, we decided to issue a Further Notice of Proposed Rulemaking to explore opportunities to advance ownership by minorities and women in broadcasting. Furthermore, I commend the Chairman on his formation of a Federal Advisory Committee to assist the agency in creating new opportunities for minorities and women in the communications sector.

IV. CONCLUSION

It goes without saying that *none* of us wants to see media ownership concentrated in the hands of a few. While reasonable minds can differ about which particular restrictions might best promote this goal — national ownership caps that vary by only five percentage points, a minimum of six versus eight owners of local television stations in a market, and so forth — we should recognize that these are in fact issues on which reasonable people may disagree. For me, given the rules we adopt today, the breakneck pace of technological development, and the ever-increasing number of pipelines into consumers' homes, it is simply not possible to monopolize the flow of information in today's world. Indeed, the fall of Communism in the 1980's and of military dictatorships in the 1990's shows that diverse viewpoints cannot be suppressed even by authoritarian governments, much less by private media companies.

The net result of our Order is *balance*: We have preserved core values by maintaining safeguards to protect against undue concentration, we have altered rules as necessary to respond to the dramatic changes that have occurred in the marketplace since the adoption of our media ownership rules many years ago, and we have provided a rigorous justification with an exhaustive study of the record. Sometimes the facts have led us to strengthen former restrictions; sometimes they have led us to relax them in part. But in all cases our decisions were based on

facts rather than fears. That is what Congress' statute requires, that is what the courts require, and that is what the First Amendment requires.

STATEMENT OF COMMISSIONER KEVIN J. MARTIN ON BIENNIAL REVIEW OF BROADCAST OWNERSHIP RULES

First, I want to congratulate Chairman Powell for his leadership on this issue. He has long advocated his vision for a new media ownership framework. Through his hard work and dedication, we are bringing this proceeding to a close and will finally adopt these proposed new rules.

I also commend Commissioners Copps and Adelstein for their tireless efforts in reaching out to the public, informing them of the issues, and encouraging them to participate in the process. While I ultimately disagree with them on the course of action the Commission should take, I appreciate and respect the contribution they have made to this debate.

The decision we make today is as difficult as it is critical. The media touches almost every aspect of our lives. We are dependent on it for our news, our information, and our entertainment. Indeed, the opportunity to express diverse viewpoints lies at the heart of our democracy. In fact, I agree with many of the concerns about consolidation and preservation of diversity that have been expressed by my colleagues this morning.

I also believe, however, that the FCC must respond to congressional and judicial calls to update our rules for the 21st century. We are under a legal mandate to review our broadcast ownership rules and determine whether they are still "necessary" in today's marketplace. If they are not, we must repeal or modify the rules. And according to the courts, this is an obligation that the Commission did not take sufficiently seriously in the past. Indeed, the courts have overturned the last three broadcast ownership rules they reviewed because the Commission did not sufficiently take into account new voices present in the current marketplace.

Therefore, we must analyze today's marketplace. As Congress anticipated and as the courts have ordered us to recognize, the media marketplace is not stagnant. Factors such as rapidly improving technology and innovation have contributed to a media landscape that is continually evolving—and considerably different from the one when most of the broadcast ownership rules were first adopted. I recall having extremely limited choices on our family television set when I was growing up. There was no cable. There was no satellite. Even with our roof antenna, we received just five channels—the three major networks, one independent, and one public television station. Our national news was delivered to us by the three networks for one-half hour, straight from New York City, at the same time every evening. No CNN, FOX, MSNBC, or CNBC. Local news was broadcast by the local stations just once at 6:00 and once at 11:00. And at that time, news from 24 hour local cable channels was far off on the horizon.

While my parents still live in the same house, they now have access to seven broadcast networks, hundreds of digital cable channels (including a local cable news channel), many more radio stations, and thousands of sites on the Internet. Indeed, people today have access to more information from more diverse sources than at any time in our history.

Clearly, the media marketplace has changed significantly since our media ownership rules were first adopted. Yet what has *not* changed is the importance of the three principles our original rules were intended to promote: competition, localism, and diversity. Fundamentally, our rules must still promote competition, localism, and diversity to nourish a vibrant media marketplace.

I am particularly pleased that, for the first time in 28 years, the Order we adopt today finally concludes a review of the newspaper/broadcast cross-ownership rule, which has prohibited a company from owning a newspaper and broadcast station in the same market. Adopted in an era with little cable

penetration, no local cable news channels, few broadcast stations, and no Internet, the rule was based on a market structure that bears almost no resemblance to the current environment. Indeed, because of these marketplace changes, we have revised all our other media rules at least once since the ban's adoption. As a result, newspapers have been the *only* media entities prohibited from owning a broadcast station in the markets they serve, regardless of how large the market was or how many newspapers or broadcast stations were present. For example, in the large markets, two broadcast television stations have been permitted to combine and could own up to six radio stations, as well. Yet, newspapers remained prohibited from owning even a single radio station. Today we correct this imbalance, finally giving newspapers the same opportunities other media entities enjoy in medium and large markets. In so doing, we recognize that newspaper/broadcast combinations may result in a significant increase in the production of local news and current affairs, as well as an improvement in the quality of programming provided to their communities.

I also am pleased that, where the Commission determines that existing rules should be modified, we have crafted simple, clear rules. I remain skeptical of overly complicated mathematical formulas and the uncertainty they can beget in the marketplace.

I appreciate the staff's hard work in developing a diversity index, and I found much of their analysis helpful in informing us of general markets trends. I also appreciate my colleagues' recognition that the diversity index cannot be used in particular transactions. A concept as complex as diversity cannot be quantified with mathematical precision.

Finally, I note that the decision regarding the national ownership cap was particularly difficult. The record contained strong evidence on both sides of this issue. I believe the affiliates made a compelling case as to why a national limit needs to be retained. I agree that a balance between the

affiliates and the networks is important to maintaining localism, and thus I did not support proposals in the record to eliminate the cap altogether. Yet, the networks also made persuasive arguments that a 35% cap is not necessary—in particular, that we do not have sufficient evidence to conclude that the two networks currently reaching over 40% of the country have caused actual and significant harm today.

The Order we adopt today attempts to respond to the courts' admonitions and our Congressional mandate by recognizing the availability of these new media outlets, evaluating their impact on our core goals, and modifying our rules as appropriate.

STATEMENT OF COMMISSIONER MICHAEL J. COPPS, DISSENTING

Re: 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996

I dissent to this decision. I dissent on grounds of substance. I dissent on grounds of process. I dissent because today the Federal Communications Commission empowers America's new Media Elite with unacceptable levels of influence over the media on which our society and our democracy so heavily depend.

This morning we are at a crossroads – for the Federal Communications Commission, for television, radio, and newspapers, and for the American people. The decision we five make today will recast our entire media landscape for years to come. At issue is whether a few corporations will be ceded gatekeeper control over the civil dialogue of our country; content control over our music, entertainment and information; and veto power over the majority of what we and our families watch, hear and read.

Two very divergent paths beckon us forward.

Down one road is a reaffirmation of America's commitment to local control of our media, diversity in news and editorial viewpoint, and the importance of competition. This path beckons us to update our rules to account for technological and marketplace changes, but without abandoning core values going to the heart of what the media mean in our country. On this path we also reaffirm that FCC licensees have been given very special privileges and that they have very special responsibilities to serve the public interest.

Down the other road is more media control by ever fewer corporate giants. This path surrenders to a handful of

corporations awesome powers over our news, information and entertainment. Here we treat the media like any other big business, trusting that in the unforgiving environment of the market, the public interest will somehow magically trump the urge to build power and profit for a privileged few. On this path we endanger time-honored safeguards and time-proven values that have strengthened the country as well as the media.

So the stakes are high – higher than they have been for any decision the five people sitting here today have ever made at this Commission. How do we decide which path to choose?

I start with three principles. First, look at the law and see what Congress instructs us to achieve. Second, look at practical, real world experience rather than cling to some prefabricated mind-set or ideology. And third, when faced with the automatic consequences that will follow such a far-reaching decision, act cautiously rather than rashly, and trust in the wisdom of the American people.

What does the law tell us? The Communications Act tells us, very clearly, to use our rules to promote the public interest, and to that end, for decades we have promoted the goals of localism, diversity and competition. The statute tells us that the airwaves belong to the American people, and that corporations are given a temporary right to use this public asset only in return for their pledge to use it in the public interest. No broadcast station, no company, no single individual owns an airwave in America; the airwaves belong to all the people. The law tells us that the last time Congress legislated on this topic, it thought that restrictions on how big a single media corporation could get and how much power one company could amass were important and necessary. And the Supreme Court has upheld media protections, stating that "it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by

the Government itself or a private licensee."[1] Finally, on the larger issue of media power, Judge Learned Hand instructed us that "The hand that rules the press, the radio, the screen, and the far-spread magazine, rules the country."[2] His words remain true today.

What practical, real world experience do we have to guide us? Radio deregulation gives us powerful and relevant lessons. When Congress and the Commission removed some of the radio concentration protections, we experienced massive, and largely unforeseen, consolidation. Very quickly after taking actions for radio like those we will take today for television and newspapers, there was a 34 percent reduction in the number of radio station owners. Diversity of programming suffered. Homogenized music and standardized programming crowded out local and regional talent. Creative local artists found it evermore difficult to obtain play time on the air. Editorial opinion polarized. Competition in many towns became non-existent as a few companies -- in some cases a single company -- bought up virtually every station in the market. This experience should ***terrify*** us as we consider visiting upon television and newspapers what we have inflicted upon radio. "Clear Channelization" of the rest of the American media will harm our country.

What about seeking out the counsel and trusting in the wisdom of the American people? Begin by realizing that every American has a stake in this decision. ***Every American***, not just the companies that have temporary license to use the public's spectrum. Commissioner Adelstein and I have attended public hearings in many cities across the country. We have met with conservatives and liberals, broadcasters and creative artists, concerned parents and civil rights activists, church leaders and educators. Our Commission has seen a

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[1] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

[2] Learned Hand, Memorial Service for Justice Brandeis, December 21, 1942.

flood of opinions from every state in the nation. Close to three quarters of a million people have registered their views now – more than for any proceeding in Commission history. And in a nation that can be deeply divided on important issues, these citizens are almost unanimous on the question of whether this Commission should allow further media concentration. They are imploring us to protect local broadcasting, diversity of programming and opinion, and the ability to compete with the huge companies. We should heed their conservatism – their urgent call to refrain from abandoning time-honored protections when so much is at stake and so much is unknown about the consequences of what we are doing here today.

The majority instead chooses radical deregulation – perhaps not quite so radical as originally intended a year ago before so much pressure was brought to bear upon them – but radical nevertheless. This decision allows a corporation to control three television stations in a single city. Why does any corporate interest need to own three stations in ***any*** city, other than to enjoy the 40-50 percent profit margins most consolidated stations are racking up? What public interest, what diversity, does that serve? This decision also allows the giant media companies to buy up the remaining local newspaper and exert massive influence over some communities by wielding three TV stations, eight radio stations, the cable operator, and the already monopolistic newspaper. What public interest, what new competition, is enabled by encouraging the newspaper monopoly and the broadcasting oligopoly to combine? This decision further allows the already massive television networks to buy up even more local TV stations, so that they control up to an unbelievable 80 or 90 percent of the national television audience. Where are the blessings of localism, diversity and competition here? ***I see centralization, not localism; I see uniformity, not diversity; I see monopoly and oligopoly, not competition.***

Take away the protections against concentration that still remain and one company could dominate a region's access to information by controlling its radio stations, television stations, newspapers and cable system. Where once it was commonplace to have two, three, or more daily newspapers in a city, today most communities are one-paper monopoly towns. Local broadcast television and radio are both concentrated oligopolies in communities across this country. And the story is not much better on a national level. The conglomerates that own the networks control 70 percent of the prime-time audience. Their audience share of television households is approaching – and could soon surpass according to analysts – the share the three networks had during the 1960s and 1970s. And today, those conglomerates are more vertically integrated, controlling the production of most of their programs as well.

What about the vaunted 500-channel universe of cable TV saving us? Well, 90 percent of the top cable channels are owned by the same giants that own the TV networks and the cable systems. More channels are great. But when they're all owned by the same people, cable doesn't protect localism, editorial diversity, or competition. And those who believe the Internet alone will save us from this fate should realize that the dominating Internet news sources are controlled by the same media giants who control radio, TV, newspapers, and cable. So, how does it promote localism, diversity and competition to allow, as we will allow by our action today, more media concentration in the more than 175 markets with over 90 percent of the American population?

If we were just starting down the road to media concentration, maybe we could have a different kind of discussion today. But we have already traveled dangerously far down that road, and the need now is to slow the headlong rush to media monopoly until someone can prove it is taking the media, and the country, anywhere worth going. This is a huge

and foolhardy gamble with the future – every American's future.

Let us remember that this is only the latest, most radical step in a twenty-year history of undermining the public interest. Step by step, rule by rule, bit by bit, we have allowed the dismantling of public interest protections and given a green light to the forces of consolidation, until now a handful of giant conglomerates are in the saddle.

The Commission has allowed fundamental protections of the public interest to wither and die – requirements like ascertaining the needs of the local audience, the Fairness Doctrine, teeing up controversial issues, providing demonstrated diversity in programming, ensuring decent quality programming for our children, to name a few of the safeguards we had once but have abandoned.

At the same time, the Commission has pared back its license renewal process from one in which it examined whether the broadcaster was actually serving the public interest to one where companies need only send us a postcard every eight years and nothing more. Unless there is a major complaint pending against a station, the license is almost automatically renewed.

The Commission cut back on its structural regulations that limited both horizontal (or distributional) concentration ***and*** vertical (or production) concentration, so that the same network distributing programs increasingly owned them. The worst monopolies in American history were built on this model. Then the Commission went further, eliminating outright the vertical safeguards that protected against a few conglomerates controlling all of the creative entertainment that we see.

Over the years, the Commission has dismantled all of these provisions and more, relying instead on marketplace forces as a proxy for serving the public interest. Along the way, make no mistake about it, localism, diversity and competition suffered

grievous wounds. Worse, the heart and soul went out of much of our media. And we are left with only the current rules governing control of ownership structure as a means to safeguard our public interest obligations. They can't do the job by themselves, even if we were to keep them as they are. By emasculating them today, we only make the problem worse. And by neglecting to do justice to proposals that could supplement our ownership rules, such as requiring more independently produced programs and enforcing real public interest performance standards on our stations, we come perilously close to taking the "public" out of the public airwaves.

Don't tell me that those of us who feel strongly about this are being too emotional or are laying too much on one set of decisions. Some would have us believe that this is merely an ordinary examination of our rules that we conduct every two years. Let's not kid ourselves. This is the granddaddy of all reviews. It sets the direction for how the next review will get done and for how the media will look for many years to come. As for the emotion, I have seen the concern, the deep feeling and outright alarm on the faces of people who have come out to talk to Commissioner Adelstein and me all across this broad land. Are they emotional? You bet. And I think they are going to stay that way until we get this right.

I. THE COMMISSION'S DECISION-MAKING PROCESS AND RECORD DEVELOPMENT WAS DEEPLY FLAWED.

Good, sustainable rules are the result of an open administrative process and a serious attempt to gather all the relevant facts. Bad rules and legal vulnerability result from an opaque regulatory process and inadequate data. Unfortunately, today's rules fall into the latter camp.

The Commission launched this biennial review proceeding in September 2002. I went into this last year believing that if the Commission really worked at it, got around the country looking

at various markets, talking to people, collecting data and really reaching out, we had a shot at building an adequate record for today's vote.

Unfortunately, we have not succeeded. I am concerned that this proceeding has been run as a classic inside-the-Beltway process with too little outreach from the Commission and too little opportunity for public participation in this far-reaching review of critical media concentration protections. This is the way the Commission usually does business, we are told. Well, I submit this is too important to be treated on a business-as-usual basis.

Let's look at the facts. In October, we released the results of a dozen FCC-sponsored studies. We gave commenters a mere 60 days to analyze the six separate media consolidation rules and to sift through the twelve studies. A number of these studies are incomplete and contested, criticized because of allegedly faulty methodologies and unwarranted conclusions. Yet today's item returns to them again and again, according them what I believe is more deference than merited, to the exclusion of other expert studies. I criticize the studies no more than the Commission's operating premise that in this far-reaching rulemaking that will affect tens of billions of dollars in industry business, we could understand its implications and its consequences through a small number of meagerly financed inquiries that ignored many of the most critical questions.

I was also saddened last Fall that we failed to open our own studies to public scrutiny by not releasing the methodology or underlying data, notwithstanding that some of the studies were based on proprietary data that parties criticized as being created for and manipulated by the media industry. Finally, a month later, while the clock for comments continued to run, we provided limited release of the underlying data, but only to those who could come to our headquarters in Washington, D.C. Requests for further extensions of time to assess these studies and provide additional record data were denied.

We then sought to promote the broader national dialogue and debate that these issues so clearly merit. Proceeding on an assumption that all expertise does not reside within the Beltway, I sought to have the Commission hold a series of forums and roundtables around the country that would include significant input from both traditional and non-traditional stakeholders. After an initial flat denial we were given only one official hearing, and it was less than 100 miles outside the Beltway in Richmond, Virginia.

That was a start, but at the time we held that hearing, a survey indicated that three-quarters of all Americans were not aware that this critical issue was being decided at the FCC. We had not told them, nor had Big Media told them. I sought additional hearings and forums. Again, no success. I sought resources to hold my own hearings and to attend forums. Again, requests for both staff assistance and funding were denied.

Using my limited office resources, I have traveled across the country to attend as many hearings and forums as I could. I commend Commissioner Adelstein for his very active participation in this hearing process. Between us, we have held hearings and attended forums in New York, Seattle, Austin, Durham, Phoenix, Chicago, Burlington, San Francisco, Los Angeles, Philadelphia, Marin County, Detroit and Atlanta. All told, there have been over a dozen gatherings to discuss media ownership.

With resources and institutional dedication, a full-fledged process involving more Commissioners could have given us the information and insight needed to craft rules that both took account of technological and market changes and fulfilled our responsibility to protect localism, diversity and competition. But we had too few resources and too little dedication. So, we are left, unsurprisingly, without the record or new ideas we need to do our job well.

More recently, the Commission has even refused to publicly disclose the rules we are voting on today. What possible harm come from transparency? How can telling Congress and the public what we plan to do possibly be bad? I see no legitimate purpose for casting our votes in a shroud of secrecy except to insulate the FCC from public scrutiny.

Therefore, Commissioner Adelstein and I sought to have the specific proposals put out for public notice and comment. We believed that the country would be much better served by putting the proposals out for comment for a limited period, say 60 or 90 days, so we could get it right, understand the consequences of the new rules (both the intended consequences and those invariably more troubling unintended ones) and let these ideas bathe in the sunshine of national debate. Such discussion would have the important additional benefit of enhancing the sustainability of any Commission decision in court by providing concrete input, analysis, and testing on specific proposals. Sound policymaking, perhaps even the law, requires no less. But the request was denied.

When a draft proposal, ***not including the proposed text of the new rules themselves***, was circulated to Commissioners a mere three weeks before today's vote, we formally requested that the Commission postpone today's meeting to provide additional time to study more thoroughly the impact of the proposals and their interplay, and to see if common ground could be found. Under long-standing Commission practices, such requests from Commissioners have generally been honored. That request was also denied.

And so, we arrive at today. Citizens across this country will hear for the first time the proposals that we are adopting. Some of the details of the rule changes have leaked to the press. Even with this incomplete information, the public reaction against the proposed changes has been unlike anything the FCC has ever experienced. This proceeding has generated three-quarters of a million comments now – more than any other proceeding that I

am aware of in the history of the FCC. Of those comments, all but a few hundred are from individual citizens. And of those, nearly every one opposes increased media consolidation – over 99.9 percent!

We've heard bipartisan concern from more than 150 Members of Congress, including the Congressional Black Caucus, Congressional Hispanic Caucus, and the Congressional Asian Pacific American Caucus, asking us to slow down and put these proposals out for public comment before we vote. Some of those Members of Congress are here today.

Dozens of organizations have weighed in with their concerns about media concentration. Among others, we have heard from Children Now, the Writers Guild of America, the Parents Television Council, the Communications Workers of America, AFTRA, the National Association of Hispanic Journalists, the National Association of Black Journalists, the Conference of Catholic Bishops, the Center for the Creative Community, Common Cause, the American Civil Liberties Union, the National Rifle Association, the American Civil Liberties Union, the National Organization for Women, the Family Research Council, the National Association of Black Owned Broadcasters, Rainbow Push, the Media Access Project, Consumers Union, the Consumer Federation of America, Move On, the Center for Digital Democracy, United Church of Christ, the Minority and Media Telecommunications Council, the Leadership Conference on Civil Rights, and many, many more across a broad political and geographic spectrum. City councils across this country in such places as Chicago, Seattle, Philadelphia, San Francisco, Atlanta, and Buffalo, as well as a whole state -- Vermont -- have gone on record against media concentration. Note, please, that several of these are cities where Big Media would have us believe that all is well with the consolidation they have introduced.

As Brent Bozell of the Parents Television Council so aptly put it, "When all of us are united on an issue, then one of two

things has happened. Either the Earth has spun off its axis and we have all lost our minds or there is universal support for a concept." Well, it's the concept – a transcending, nationwide concept. This issue is not Republican or Democratic. It is not liberal or conservative. Not North or South. Not young or old. It is an all-American issue.

The FCC is not, of course, a public opinion survey agency. Nor should we make our decisions by weighing the letters, cards and e-mails "for" and the letters, cards and e-mails "against" and awarding the victory to the side that tips the scale. But even this independent agency is part of our democratic system of government. And when there is such an overwhelming response on the part of the American people and their representatives in Congress assembled, we ought to take notice. Here the right call is to take these proposals, put them out for comment and then -- only then -- call the vote. Plausible arguments have been put forward that the letter of the Administrative Procedure Act requires this. Other legal experts demur. I do know this: the spirit underlying notice and comment is that important proposed changes need to be seen and vetted before they are voted. Today we vote before we vet.

Now the only opportunity all these concerned citizens have to comment on the specific rules is to file reconsideration petitions after the decision is already made. Given that such petitions are unlikely to be resolved for months, the impact of this decision by then will likely be irreversible. In such a situation, we ought to establish a longer timetable and procedure for implementation of these changes to the rules, just as the Commission did when it dismantled the financial interest and syndication rules a decade ago. Such a procedure would allow the Commission to consider petitions for reconsideration on these specific rules to protect against irreversible, unintended and unforeseen negative consequences. This would also allow the Commission to examine its proposed rules and determine if additional measures are needed to protect the

public interest before consolidation occurs, and it would allow Congress opportunity for any input that it may deem appropriate.

II. THE RECORD DOES NOT SUPPORT THE MAJORITY'S DECISION TO UNDERMINE MEDIA CONCENTRATION PROTECTIONS.

In reviewing our first biennial review, the D.C. Circuit faulted the Commission for its failure to provide an adequate explanation for its rules.[3] Importantly, the court did not indicate that a relaxation of the concentration limits is warranted or required.[4] On the contrary, the Commission could choose, if so inclined, to ***tighten*** its ownership rules. What the court demands is that the Commission provide more analysis and empirical data to justify the rules it adopts. And I do not believe the courts want only granular, data-driven justifications; I think they would welcome justifications more deeply grounded in history, macroeconomics, political theory and the philosophy of democratic government. In any event, we are obligated to present reasoned rationales with more compelling explanations than we have thus far presented. But we are ***not*** instructed to radically restructure the rules.

My overarching reaction to the record before us is this: first, the evidence we have gathered does not justify such loosening of the rules as the majority approves today and, secondly, we have not asked a sufficiently diverse range of questions to do justice to so important a public issue. The evidence we have amassed points to the need for maintaining existing media concentration protections.

The court was particularly troubled by inconsistencies in our previous decisions. Yet, in this Order, the majority once again

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[3] *Sinclair Broadcasting Group, Inc. v. FCC*, 284 F.3d 148, 168-69 (D.C. Cir. 2002); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1041-45 (2002), *rehearing granted*, 293 F.3d 537 (D.C. Cir. 2002).

[4] *Sinclair*, 284 F.3d at 162.

fails to provide coherence and internal consistency to the rules and rationales we adopt. I am concerned that these inconsistencies will undermine the decision on appeal and will open the decision to the charge that it was made to reach the result sought by companies that want to consolidate. I provide below a few examples of these inconsistencies.

A. The Majority Ignores the Lessons of Radio Concentration.

In 1996 Congress and the FCC eliminated the national cap for radio concentration. Over the years the Commission has loosened its local radio concentration rules so that one corporation can now own up to eight stations in a market. These deregulatory changes provide the FCC with a record to study the impact of fewer media concentration protections on localism, diversity and competition.

The largest company owned less than 75 stations before deregulation. Today one company, Clear Channel, owns more than 1,200 stations. This company owns eight stations in many cities, and in some towns owns virtually all the stations available. The number of radio station owners has decreased by an incredible 34 percent since 1996. The number of minority owners has dropped by a shocking, and nationally embarrassing, 14 percent. A Future of Music Coalition study shows that music has become more homogenous and that many stations are now programmed by computers hundreds of miles away rather than by local DJs, leaving no local content. In our hearings around the country, Commissioner Adelstein and I have talked to many capable young musicians and creative artists who are simply unable to secure air time in the new consolidated radio environment. Real news radio is dying outside the largest cities, and viewpoint diversity has given way to a constant drumbeat of one-sided talk shows.

Even supporters of today's decision have been heard to say that the state of radio is troubling – yet the Commission charges ahead to deregulate TV and newspapers without

comprehensively studying the results of radio concentration. The failure to do so ignores critical information that is both relevant to these rules and that suggests the rules we vote on today are a mistake.

Even worse, although the majority claims it is taking steps to limit radio concentration, in fact the majority today launches a new round of consolidation in radio. First, the majority eliminates the radio/TV cross-ownership rule which limited the number of commercial radio and television stations one company could own in a market. Without these cross-ownership limits, companies can expand their reach even further. In addition, in the name of helping small businesses, minorities, and women, the majority creates a huge new loophole for consolidation above even the limits set today. The majority grandfathers any clusters that are above the caps. It further allows a company to transfer those licenses to a small business. After only three years, the majority allows the small business to sell those stations to anyone else without restriction -- even if it is to Clear Channel or some other giant media conglomerate. This decision will encourage a regulatory shell game that threatens to make a mockery of the radio limits.

B. The Decision To Raise the National Ownership Cap to 45 Percent is Arbitrary.

Current protections limit TV networks to controlling 35 percent of the national TV audience. Today we increase this limit to 45 percent, encouraging what Merrill Lynch calls a "Gold Rush" of acquisitions of local stations by the big four networks. The Communications Act insists that the Commission protect localism, diversity and competition. In reviewing the last biennial review, the D.C. Circuit held that diversity and localism are valid public interest goals and that the Commission could determine that the national ownership cap is necessary in the public interest if it serves either interest. The court held, however, that the Commission had failed to

provide sufficient evidence that either objective was served.[5] The majority today correctly determines that a national cap is needed to serve the statutory goal of having independently owned affiliates continue to serve local community needs and to act as a counter-balance to the national networks. The majority, however, arbitrarily determines that the cap should be raised from 35 percent to 45 percent without adequately justifying this new number, seeking comment on this specific number, or presenting their rationale for arriving at it. The courts may exact a heavy toll on the majority for these omissions.

The National Association of Broadcasters, the Network Affiliated Stations Alliance, and other parties favoring retention of the 35 percent cap submitted exhaustive and largely uncontested evidence including economic studies, station surveys, in-depth analyses, and numerous market-specific examples to justify retention of the 35 percent cap. The record evidence demonstrates, among other things, that independently owned affiliates are better able to preempt network programming networks based on community standards and needs; that the 35 percent cap ensures a critical mass of affiliates necessary to perform this role effectively; and that a substantial majority of affiliates are experiencing increasing pressure from the networks not to preempt network programming. Yet, the majority largely ignores this evidence and arbitrarily chooses a number that tips the balance further in favor of the national networks and away from the local stations. The majority fails to explain how a 45 percent cap – in reality a 90 percent national cap with the illogical UHF discount as discussed below – meets Congressional goals.

The majority justifies an increase in the cap to 45 percent based on the assertion that affiliates preempted networks with a national reach of over 35 percent as often as those with less

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[5] *Fox*, 280 F.3d at 1042-43.

than 35 percent. It does so without accounting for the weight of evidence in the record that supports retaining the 35 percent cap. The majority further reasons that the 45 percent cap could accommodate all existing combinations. But this goal could have been met with a 40 percent cap as well. Yet the majority concludes that it needs to allow conglomerates to grow further without any explanation for this particular number. I repeat: the prospects for successful judicial scrutiny are not well served by this approach.

Some have argued that the only way to preserve free over-the-air television is to let the big conglomerates get even bigger. Unless we allow even more concentration, the argument posits, over-the-air television is doomed. I find the arguments regarding the networks' financial distress to be far-fetched, more likely totally ludicrous. The facts tell such a different story. The networks, with their ability to deliver a large number of viewers across the country, have become even more valuable. They not only reach consumers over the air through their own highly profitable stations and through affiliates, but they are also guaranteed carriage to cable subscribers. Indeed, they own much of cable. The record demonstrates that the top four networks maintain the greatest reach of any medium of mass communications. I find no convincing evidence in the record of network poverty or financial distress. Although it is difficult to break out a precise measure of one part of these large conglomerates' operations, it is clear that their broadcast operations are profitable. Moreover, the network operations enhance the profitability of other parts of the conglomerate. The Commission itself recently concluded that, "Broadcast television is certainly a survivor, even a vigorous survivor."[6] The networks command an enormous advertising premium.

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[6] Jonathan Levy, Marcelino Ford-Livene and Anne Levine, *Broadcast Television: Survivor in a Sea of Competition*, Federal Communications Commission, Office of Plans and Policy Working Paper 37, 309 (Sept. 2002).

They recently received a record $9.4 billion in up-front prime-time advertising for the next season. They have ownership in most of their profitable programs, and these are subsequently put into syndication or "repurposed" – the fancy new term for a re-run. These companies know how to move costs around, shift assets and make things look good or bad as they need to do for various audiences. Sometimes regulators hear a very different story than Wall Street analysts hear. I believe the argument that the only way for the less well-off among our citizens to continue receiving free, over-the-air television is through allowing already powerful networks to grow more powerful would have been better left unsaid.

I would add a point on the much-touted economies of scale and the alleged efficiencies of bigness, because it may be that the networks do have a longer-term reason to worry. This country has witnessed the unraveling of huge mega mergers and acquisitions across economic sectors during the past couple of years, while other such ventures are struggling to make it. We should have learned by now that size is no guarantor of success, even though the urge to grow larger continues to motivate so many industries. Suppose we whittle down the media world to an even more precious few, and some of these begin to implode like other huge deals have imploded. Talk about stations going dark! Talk about striking at the heart of the country! Sometimes I think the networks need to be protected from themselves.

C. Maintaining the 50 Percent UHF Discount In the Face of Technological and Marketplace Changes Is Arbitrary.

Understanding the so-called "UHF Discount" is critical to understanding how the new 45 percent cap will actually work. Under the UHF Discount policy, UHF stations are considered to reach only 50 percent of the households that a VHF station reaches in a market for purposes of determining whether a company has exceeded the national ownership cap. When established in the mid-1980's, this discount was designed to

take into account the technical limitations of over-the-air UHF stations. The Commission found that over-the-air UHF stations reached fewer viewers than VHF stations because their signals were different and weaker. But UHF and VHF stations reach an identical number of viewers when delivered over cable TV facilities. The differences between UHF and VHF only manifest themselves when they are broadcast over the air. Why didn't the Commission consider this in the 1980's? Because at that time cable penetration was only around 35 percent, so the vast majority of Americans received their television signals over the air. Today over 85 percent of consumers receive their signals from cable and DBS. Cable signal carriage rules ensure that consumers receive the UHF signal, and DBS operators are required to carry all UHF stations in any market where they carry any local channel. According to the record, these changes in the market are reflected in the valuations of UHF licenses which are approximately 10-15 percent less than VHF licenses with similar affiliations. Indeed, the Commission itself in previous proceedings has recognized that the growth of Multichannel Video Programming Distributor (MVPD) subscribership has reduced the UHF signal handicap.[7]

With 85 percent of Americans experiencing no difference between UHF and VHF stations, the discount no longer makes sense. Eliminating the entire discount may be warranted, but at a minimum it requires replacement with a number that reflects the reality of today's technology and marketplace.

Notwithstanding the majority's repeated admonishments that the Commission must take into account changes in the marketplace and in technology and must provide empirical data for the rules it adopts, the majority inexplicably, and I believe wrongly, retains the UHF discount in its present form without performing the comprehensive review that is required.

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[7] *See, e.g.*, Review of the Prime Time Access Rules, 60 Fed. Reg. 44773 n.101 (1995).

Adding to the inconsistency in this decision, when the majority conducts its analysis of the cross-ownership and local television rules, it counts the number of television stations in the market. All stations – whether UHF or VHF -- are counted equally in this analysis and assumed to be available throughout the market. How can it be that, in one part of the decision, UHF stations are determined to reach the entire market, and in another part of the same decision, those stations are determined to reach only half the households?

Eliminating or changing rule after rule to allow further consolidation on the basis of changed technology and market conditions yet refusing to change the one rule that the networks approve will lead many to believe that this decision is results-oriented, that it is designed to ensure that no station group exceeds the national cap, and that conglomerates may continue to grow no matter what technological or marketplace changes may occur.

III. THE MAJORITY'S RULES AND REASONING ARE ARBITRARY AND INCONSISTENT.

As described above, I believe that the majority has made serious errors in its high-level decisions to restructure media concentration protections. It is also important to recognize that when one digs into the details of today's action, it becomes clear that it is riddled with arbitrary decisions and inconsistencies. I describe a few of them here.

A. The Majority Protects Against Mergers of the Top Four Television Stations in a Market but Inconsistently Allows a Monopoly Newspaper To Purchase Even the Top Television Station.

In the local television ownership rule, the majority recognizes that a single entity can achieve excessive market power through consolidation. The majority therefore precludes one company from owning two of the top four television stations in a market. The majority further treats news sources

as interchangeable in its "Diversity Index" that counts different media news outlets available to consumers. Yet, although the majority constrains two of the larger local news voices in the market from combining in the local television rule, the majority arbitrarily provides no similar constraints in its cross-ownership rules. The Order allows a newspaper – clearly a significant news voice in the market – to purchase one of the top four television stations, thereby potentially harming consumer welfare and eliminating a voice just as surely as allowing two of the top four stations to merge. The majority does not explain this inconsistency. Nor does it explain how allowing a newspaper with say 80, 90, or even more of the circulation in a community to merge with the top station in that market would help a smaller newspaper or television station survive. Indeed, such a merger could allow the creation of a dominant news outlet in the market against which no other entity could compete. Yet, the majority does not explain how eliminating one strong local news voice through consolidation will benefit diversity, localism or competition in that market.

An additional problem concerns the majority's method of counting news voices in the market. The Diversity Index counts television, newspapers, radio, and the Internet as local news outlets. It weighs television most heavily, and gives Internet sites the least weight, based on where consumers ***actually*** obtain their news. The majority, however, then counts all outlets within a medium equally in assessing the level of consolidation allowed. This inconsistency between using actual news sources in one part of the Diversity Index and potential news sources in another leads the majority to count a television shopping channel as heavily as a station with local news programming when assessing news outlets within a community. In sum, the majority bases its Diversity Index on where consumers supposedly obtain news, but then arbitrarily allows cross-ownership based on all television stations, not just those providing news.

B. The Majority Inconsistently Accepts "Highly Concentrated" Markets and Arbitrarily Treats All Television Stations as Equals.

In its local television ownership rule, the majority allows one entity to own three stations when there are at least 18 stations in the market. The majority reasons that requiring 18 stations will preserve at least six independent voices and therefore, ensure the market is at most moderately concentrated. The *Merger Guidelines* of the U.S. Department of Justice and the Federal Trade Commission categorize any market with fewer than the equivalent of 10 equal-sized independent entities as "concentrated," and any market with fewer than 6 such entities as "highly concentrated."[8]

But the new rules go even farther, permitting even more concentration by allowing duopolies in markets with as few as five stations. Thus, broadcast television in many markets across the country may be highly concentrated. Moreover, given that all stations do not provide local news, the market for broadcast television newscasts will be even more highly concentrated. The majority does not take account of this fact.

Why does the majority believe that allowing concentrated local markets is acceptable? Why does it believe that allowing even highly concentrated markets is acceptable in markets with 5 to 6 stations? Why does it treat all TV stations as equals, from the Home Shopping Network to the local NBC station, whether or not they have local news?

A similar problem of concentration occurs in the context of the local radio rule. At present, we not only limit the overall number of stations one entity can own, but we also flag mergers that will result in one or two entities dominating a market, thereby initiating a public interest review by the Commission. The majority would have the Commission rely only on a station limit, without any examination of the audience or advertising

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[8] Horizontal Merger Guidelines, 57 Fed Reg. 41552 (1992).

share. Without such limits, one company could acquire all of the top stations in the market, with the result being that one entity dominates, or even monopolizes, that market.

C. The Majority Arbitrarily Fails To Account for Local Market Conditions in its Bright-Line Rules Undermining Localism, Diversity and Competition.

The record demonstrates that every local newspaper market is "highly concentrated" according to the Department of Justice's Hirfindahl-Hirschman Index. Indeed, most communities have become one newspaper towns. The vast majority of local television and radio markets are tight oligopolies, with even higher levels of concentration for local news. I do not find that the majority accounts for this extreme level of concentration in its decision, ignoring quantifiable data in the process.

A rulemaking that met our statutory obligation to safeguard localism, diversity and competition would have examined the voices available in specific local markets and whether proposed transactions would undermine these principles in specific communities. The majority's reliance on national bright line rules does not allow us adequately to take into account different situations in local markets. The majority inconsistently allows parties to seek waivers of our rules where local conditions mean a transaction that violates the bright line rules would in fact not offend localism, diversity and competition; but it does not similarly accept petitions to deny transactions that undermine these core principles even if they meet our bright line rules. This one way ratchet is arbitrary and irrational.

D. The Majority Arbitrarily Concludes that All Consolidation Will Enhance News and Informational Programming.

The majority arbitrarily concludes as a general nationwide matter that efficiencies created through consolidation will enhance news and informational programming. They therefore,

a priori, determine that all mergers that cause concentration levels up to our bright line rules will serve the public interest, without any individualized examination of the facts of a particular merger. There is no record to support such a sweeping conclusion. The majority, without such support, bases its rules on the hope that companies will use some of the money they save through consolidation to invest in more news and informational programming. But the record shows that instances where companies have provided more news and informational programming following consolidation are overwhelmed by instances where news voices and news programming in a market were eliminated.

E. The Majority Arbitrarily Treats Television Stations, Newspapers, Radio Stations and Internet Sites Equally For Purposes of Analyzing Diversity and Competition in the Local Market.

The majority treats broadcasters as just one voice among many, no different from a website. The majority's analysis depends upon treating different types of media as equally important "voices" in the local market. Clearly, different types of media are not identical in providing localism, competition and diversity. This analysis ignores that broadcasters play a distinct role in our media. They are granted the right to use a public resource and, in exchange, they commit to serve their local communities. Notwithstanding the majority's assertions about new technologies and the availability of alternative sources of information, the fact remains that there is still an inadequate number of frequencies to accommodate all those who wish to broadcast to local communities.

We should recognize and reaffirm the proud heritage of local broadcasters, many of whom are strongly committed to serving the public interest. Unfortunately, consolidation has meant that broadcasters are less and less captains of their own fate and more and more captives to Wall Street and Madison Avenue expectations. One large station owner reportedly stated that,

"We're not in the business of providing news and information. We're not in the business of providing well-researched music. We're simply in the business of selling our customers products." Another large station group's "local" news is actually "distance cast" from one central location hundreds of miles away. During the hearings and forums that Commissioner Adelstein and I attended, we heard time and again from small, local broadcasters that consolidation has had a direct and detrimental impact on their ability to compete against the large conglomerates that cut costs by consolidating operations outside of the community. Although there are few such poignant examples, it is not only such places as Minot, North Dakota that are feeling the effects.

F. The Majority Arbitrarily Subordinates Diversity and Localism Concerns To Competitive Concerns.

The majority subordinates the statutory goals of localism and diversity to competition throughout its analysis. The principles of localism and diversity are deeply rooted in our history. Since the earliest days of our nation, access to a diversity of viewpoints on issues of public importance has been considered essential to democracy. Maximizing the number of independent owners increases the likelihood of a wider range of viewpoints. And Congress mandated that we protect localism because local media tailor their programming to the needs of their communities.

Yet, the majority time and again relies only on measures of economic efficiency to justify rule changes, but does so at the expense of viewpoint and ownership diversity. It is clear that it would be less expensive to have one owner control all of the news outlets and to have the local broadcaster merely act as a passive feed for a national network. But the American broadcast system is based on more than just market forces. Any rule changes must be evaluated in diversity and localism terms, and not just economic terms.

I am pleased that the majority at least acknowledges the important goal of having adequate minority and female ownership in the broadcast industry. But I am disappointed that it then fails to take well-considered action to try to achieve this goal. Minority ownership is vitally germane to this proceeding. I fail to see how we can perpetuate diversity of viewpoint, for example, without addressing minority ownership. Ownership matters to diversity. The issue of its impact on women and minorities should not be relegated to a Further Notice at some indeterminate time. It is not enough to allow dominant clusters that exceed our limits to be transferred to small businesses and then, after a few years, be transferred to a large media conglomerate. How does it benefit minorities and women to maintain such high levels of concentration in a market? How will minority- and female-owned businesses break into a market if the stations are already locked up? Wouldn't these businesses be better served if there were more opportunities for ownership and we addressed such problems as access to capital?

Other facets of diversity fare even less well. The majority concludes that market forces will ensure adequate program diversity, and it dismisses outlet diversity and source diversity as independent goals. There is inadequate record support for these sweeping decisions. Lacking record support, the majority merely offers us and unproven beliefs for comfort.

In the end, this decision also disserves competition. In a media world already well down the road toward high levels of consolidation, questions of preserving small, independent voices and of encouraging conditions conducive to new market entry should be a top Commission priority. Instead, I hear around the country, and I read in newspapers almost every day, the anguish of independent stations facing the prospect of imminent absorption by one of the media Goliaths. Some of these independents serve very diverse audiences and what they

fear most is that the first casualty of a buy-out would be their very diversity.

IV. THE ORDER FAILS TO CONSIDER SEVERAL RELEVANT CONCERNS AND TO INCLUDE SEVERAL IMPORTANT PROPOSALS.

The previous section describes a number of problems with the contents of the Order. But equally troubling are the Order's omissions. The Commission has not conducted adequate analysis to make an informed decision on the impact of the additional consolidation we allow today. The studies the Commission conducted are a start. But, even putting aside the myriad criticisms of the conclusions and methodology employed in these studies, the Commission only examined a few questions. Amazingly, we did not even attempt to consider the prospective impact of the consolidation that would occur following these rule changes. Nor have we ascertained how these rule changes interact and work in concert, instead apparently assuming that each rule is an island, and that the interactivity of rule changes will not have important effects on the media landscape. These studies also do not consider what the impact of these rule changes will be on local communities across this country.

This section details several relevant specific concerns that are not adequately addressed in the Order, and several important proposals that, if included in the Order, would have greatly improved it.

A. The Order Should Address the Impact of Undermining Concentration Protections on Independent Programmers.

Commenters addressed the need to require more independent programming on our airwaves so that a few conglomerates do not act anti-competitively to control all of the creative entertainment that we see. These proposals should have received the serious attention they deserve in ***this*** decision.

Over the past decade, we have witnessed a substantial increase in the amount of programming owned by the networks. Where once independent production accounted for much of what we saw, we now have huge vertically-integrated conglomerates that own the vast majority of the programming they deliver.

As we loosen the concentration limits, we should have addressed whether there is a need for independent programming requirements to ensure that we do not end up with national vertically-integrated conglomerates that control the distribution channels ***and*** all of the content we see and hear. The powers of vertical concentration in today's broadcast industry are part and parcel of the power that accompanies ownership. Network ownership of the full range of prime time programming constrains competition, consigns independent production to oblivion or, at best, minor and marginal roles, and it cripples the production of diverse programming. It also entails serious job losses for thousands of workers, including creative artists, technicians and many, many others. I am disappointed that the majority dismisses out of hand the issues raised by independent content producers. The majority expresses doubt that it had notice to act and then finds that changes to our rules are not warranted in any event.

B. The Order Should Establish a Legitimate License Renewal Process To Partially Protect Against the Risks of Further Consolidation.

Some commenters suggested the need for an effective license renewal process under which the Commission would once again actually consider the manner in which a station has served the public interest when it comes time to renew its license. The Commission formerly did exactly that. But the system has degenerated into one of basically post-card license renewal. Unless there is a major complaint pending against a station, its license is almost automatically renewed. A real, honest-to-goodness license renewal process, predicated on advancing the public interest, might do more for broadcasting

than all these our other rules put together. Such a process, properly designed, would avoid micro-management on a day-to-day basis in favor of a comprehensive look at how a station has discharged its public responsibilities over the term of its license. Such an approach is most certainly within the scope of this proceeding, if for no other reason than the objective of our ownership rules is to benefit the public interest. It would certainly be a welcome supplement to achieving the goals Congress established for the ownership caps.

C. The Order Should Require Licensees and Those Seeking License Transfers To Periodically Report To the Public How They Serve the Public Interest.

From the earliest days of broadcasting, the Commission has sought to promote localism and obligated licensees to serve the needs and interests of the local communities. Why not require licensees to disclose more publicly how they are serving the public interest and the needs of their local communities? Such information, perhaps made available on the Internet, would give the public an overview of how its airwaves are being used and might provide incentives to produce more and better local news and community programming. At a minimum, it would allow us to analyze whether our rules are actually achieving their desired goals so that future Commissions can make better decisions.

In addition, as discussed above, special disclosure rules ought to apply to buyers and sellers seeking to transfer a license. They ought to specify the tangible, concrete ways in which the transaction would serve the public interest. The merged entity would then have to disclose after the transaction how it fulfilled its public interest benefits. Such a step would allow the Commission to identify those transactions that serve the public interest, convenience, and necessity, as required by the statute. The majority claims that consolidation could lead Big Media to produce more and better local news and community programming. Let's take some action to make sure

this expectation is met and to hold conglomerates accountable after mergers. Moreover, this procedure would allow us to identify those transactions in all markets -- including smaller markets -- that serve the public interest.

D. The Order Fails To Analyze the Impact of Undermining Concentration Protections On Children, On Families, and on Indecent Programming.

In our hearings, we heard from parents fed up with the rising tide of indecency and violence on the airwaves and repulsed by programming's race to the bottom. We also heard from broadcasters who had managed network-owned and operated stations and were unable to preempt programming that they believed was not suitable for their community. These broadcasters told us that programming decisions were often made by distant network executives rather than by local station managers. In contrast, we heard from independent local broadcasters who had stood up to programming they and their communities found inappropriate.

Some have suggested that there may be a link between increasing consolidation and increasing indecency on our airwaves. Yet, the Commission failed to address this issue in its analysis. Has consolidation led to an increase in the amount of indecent programming? When programming decisions are made on Wall Street or Madison Avenue, rather than closer to the community, do indecency and excessive violence grow more pervasive? I do not know the answer to this question. I do know this: we have no business voting until we take a serious look at the matter and amass at least a credible body of evidence. We owe it to our children, and their parents, to explore this question before voting on whether to allow more consolidation.

I say again: ownership matters. If it is not germane for this proceeding to ascertain whether there is a possible relationship between indecent content and the fact that a shrinking Media Elite controls that content, then I do not know what is germane.

In addition to its failure to consider the impact of consolidation on indecency, the majority does not look at the relationship between concentration and ***positive*** children's programming. We now have some data on this subject in the record. The news unfortunately is not good. A recent study analyzed the market in Los Angeles and found that the number of broadcast TV programs for children dropped sharply after independent local stations were swallowed up in media mergers. This study found a 47 percent drop in children's programming with duopolies accounting for the largest decreases. Another recent survey found that 80 percent of parents think the FCC is doing a poor to fair job of protecting families and children. Unfortunately, we do not take actions today to gain their confidence. Although the Commission does take a positive step today to ensure that duopolies and triopolies will not merely rebroadcast the same children's programming, we do nothing to examine how Big Media will serve our youngest viewers and listeners before allowing further consolidation to take place.

Some believe that the First Amendment does not allow us to consider these subjects in relation to our concentration rules. But there are laws in force today on both of these subjects and courts have upheld special responsibilities for broadcasters related to these goals. If there is a question of whether the Commission can constitutionally try to use concentration restrictions to reduce indecency and increase children's programming, let us have that debate on the record rather than ignore these clear Congressional goals.

E. The Order Fails To Analyze the Impact of Undermining Concentration Protections on Women and Minority Groups.

Twenty-five years ago, in the FCC's Statement of Policy on Minority Ownership of Broadcast Facilities, the Commission said, "It is apparent that there is a dearth of minority ownership in the broadcast industry." A quarter of a century later, there

still is. Although today's Order recognizes the importance of minority and female participation, we fail to conduct rigorous analysis of the impact of today's rules on minorities and women.

We know that there are substantially fewer radio station owners today than there were before the rules were changed in 1996. People of color now make up less than four percent of radio and television owners. The National Association of Black Owned Broadcasters tells us that the number of minority owners of broadcast facilities has dropped by 14 percent since 1997. People of color are under-represented not only in boardrooms, but in newsrooms as well. Maybe that's why a study from Fairness and Accuracy in Reporting found that 92 percent of sources interviewed on the nightly network news were white and 85 percent were male. A handful of huge companies stand astride the media world and it is not helping diversity of viewpoint, diversity of ownership, or just plain old American diversity.

It is not surprising therefore that among those opposing the relaxation of ownership rules are the Congressional Black Caucus, the Congressional Hispanic Caucus, the Congressional Asian Pacific American Caucus, the Leadership Conference on Civil Rights, the National Organization for Women, the National Association of Black-Owned Broadcasters, the National Association of Hispanic Journalists, the National Association of Black Journalists, and many others who are afraid that additional media concentration will reduce opportunities for minorities and women.

We have not even attempted to understand what further consolidation means in terms of providing Hispanic Americans and African Americans and Asian-Pacific Americans and Native Americans and women and other groups the kinds of programs and access and viewpoint diversity and career opportunities and even advertising information about products and services that they need. America's strength is, after all, its

diversity. America will succeed in the Twenty-first century not in spite of our diversity, but ***because*** of our diversity. Diversity is not a problem to be overcome. It is our greatest strength. ***And our media need to reflect this diversity and to nourish it.*** It takes no rocket scientist to understand that changing the rules of media consolidation is likely to have far-reaching effects on different groups.

The decision today states that we will address minority and female ownership proposals in the future once we have established a new Advisory Committee on Diversity. An advisory committee is a good step, but we should not be deflected from tackling the ownership diversity questions that are central to the media concentration item before us now. I am reminded of that old bureaucratic sleight-of-hand of foisting controversial issues onto a new government commission or task force to get them out of the way. In any event, solutions to this problem will be harder to come by if media conglomerates proceed now to lock up control of the scarce licenses to use the public's airwaves. That is why these problems need solutions now, not somewhere far down future's road.

Where the Commission has acted in this decision, it is not to the benefit of minority communities. The majority even determines that those who speak Spanish or any language other than English do not deserve the limited protections the Commission adopts today. The cross-ownership rules apply only to English-language newspapers unless it can be demonstrated that another language is dominant in that market. Thus, these safeguards are not even triggered by a merger between a broadcaster and, for example, a Spanish-language newspaper in most communities in this country. This decision allows even higher levels of media concentration for the millions of Americans who depend on non-English media for their news and entertainment.

F. The Order Fails to Analyze the Impact of Consolidation on Small, Local Broadcasters.

Increasing consolidation threatens the very survival of small, local broadcasters. Media analysts expect that the only option for local broadcasters will now be to sell. They conclude that those that want to remain will face an extremely tough road. During our hearings, we heard from small broadcasters that had already been squeezed out of the market. These rule changes can only accelerate this trend. These changes could spell the end for such uniquely local stations as WCIU TV in Chicago and many other small, independent broadcasters. Yet, we have failed even to consider the impact on these local broadcasters.

G. The Order Fails To Analyze the Impact of Undermining Concentration Protections On Small Businesses and Advertisers.

Changes to media concentration rules also threaten small businesses. As fewer and fewer companies control our media outlets, small local broadcasters will find it harder and harder to compete. Other small businesses will find it harder to produce and sell programming as national vertically integrated conglomerates control local distribution.

Concern has been expressed in the hearings that Commissioner Adelstein and I conducted that consolidated media markets are more expensive for advertisers. We have also heard concerns relative to consolidated media companies forcing advertisers to run ads in all their media assets and stations, not just the ones the advertisers really want. This means that even if per-eyeball ad rates look stable in a market, real-life advertising expenses may be rising significantly. And small businesses may not be able to afford advertising on multiple outlets, even if the rates in one particular market are not rising. This is another of those circumstances that need study before we proceed to vote.

Moreover, we have heard that consolidation may lead to homogenization and media geared to certain and limited demographics. Already, we have seen a reduction in children's programming due to consolidation. This means that advertisers

who want to reach minority groups or niche communities may be stuck without a way to access them.

Small businesses have been, and will continue to be, the engine of growth in our country. Yet we fail here to analyze how media consolidation will affect small businesses. The Office of Advocacy of the Small Business Administration strongly urged the Commission to conduct such an analysis prior to rushing ahead with a decision.

V. CONCLUSION.

I began this proceeding hopeful that we would take a balanced, measured approach, engage in fact-finding and open discussion, and reach out to stakeholders across this land. Instead, in the face of (1) a record that simply does not support the changes being proposed, (2) a record that fails to do justice to the larger implications of these issues, (3) overwhelming public opposition, (4) widespread and bipartisan concern about both the substance and the process that have been followed here and (5) the potential for great and irreversible consolidation before we fully understand the consequences of our actions, I am convinced this is the wrong decision. It is wrong for the media industry, wrong for the public interest, and wrong for America.

All this means that I am deeply saddened by the Commission's actions today. Some have characterized the fight against this seemingly pre-ordained decision as quixotic and destined to defeat. But I think, instead, that we'll look back at this 3 vote as a pyrrhic victory.

This Commission's drive to loosen the rules and its reluctance to share its proposals with the people before we voted awoke a sleeping giant. American citizens are standing up in never-before-seen numbers to reclaim their airwaves and to call on those who are entrusted to use them to serve the public interest. In these times when many issues divide us, groups from right to left, Republicans and Democrats,

concerned parents and creative artists, religious leaders, civil rights activists, and labor organizations have united to fight together on this issue. Senators and Congressmen from both parties and from all parts of the Country have called on the Commission to reconsider. The media concentration debate will never be the same. This Commission faces a far more informed and involved citizenry. The obscurity of this issue that many have relied upon in the past, where only a few dozen inside-the-Beltway lobbyists understood this issue, is gone forever.

I believe, after traveling the length and breadth of this country, that our citizens want, deserve, and are demanding a renewed discussion of how their airwaves are being used and how to ensure they are serving the public interest. I urge my colleagues to heed the call. I want to thank the hundreds of thousands of people who have attended hearings, filed comments, written letters to the editor, and contacted the Commission. You have made a difference. And if you stay the course now, we have a chance to settle this issue of who will control our media and for what purposes, and to resolve it in favor of public airwaves of, by and for the people of this great country.

STATEMENT OF COMMISSIONER JONATHAN S. ADELSTEIN DISSENTING

Re: 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996

This is a sad day for me, and I think for the country. I'm afraid a dark storm cloud is now looming over the future of the American media. This is the most sweeping and destructive rollback of consumer protection rules in the history of American broadcasting.

The public stands little to gain and everything to lose by slashing the protections that have served them for decades. This plan is likely to damage the media landscape for generations to come. It threatens to degrade civil discourse and the quality of our society's intellectual, cultural and political life. I dissent, finding today's Order poor public policy, indefensible under the law, and inimical to the public interest and the health of our democracy.

In the end, this Order simply makes it easier for existing media giants to gobble up more outlets and fortify their already massive market power. It capitulates to many of the longstanding demands of the media companies we oversee.

This approach shatters most of the last vestiges of the consumer protections that weren't eliminated in the 1980's. This decision pulls the teeth out of the remaining rules, leaving the FCC a toothless tiger. As big media companies get bigger, they're likely to broadcast even more homogenized programming that increasingly appeals to the lowest common denominator. If this is the toaster with pictures, soon only Wonder Bread will pop out.

It may take a while for the public to feel the full effects of today's decision. Consolidation in the media markets could take place over a number of years, just as it did in radio. But people will notice every time a new merger goes through that eliminates a voice in a community. Their anger will flash as they surf through their channels only to find more sensationalism, commercialism, crassness, violence, homogenization and noticeably less serious coverage of news and local events, just as many Americans warned me they expected to happen if we allowed further consolidation.

It didn't have to turn out this way. Congress and the courts forced a massive review. They did not force massive deregulation. We had a choice. The courts required us to justify our rules, not to gut them or replace them with pale substitutes. Certainly, the media markets have changed, and our rules must keep pace. But the majority chose to go much further than Congress or the courts required. They chose to pursue gratuitous deregulation. This is by far the most dramatic weakening of our media ownership rules this country has ever seen.

This has turned out to be a painful process. I had hoped for a better outcome I could support, or at least oppose less strenuously. The Commission undertook the most comprehensi e review of its rules ever. It was designed as an effort to produce a judicially-sustainable, intellectually-coherent framework. But those good intentions and good faith efforts didn't pan out. The comprehensive framework never materialized. An effort begun with serious intellectual aspirations descended into an incoherent, outcome-driven political document, the likes of which the Commission has too often seen and sought to avoid.

A new regime for a new era never materialized. Instead, we're left with a muddled patchwork of meager protections. The only consistent elements are market-driven philosophies and deregulatory outcomes. The Order is rife with references

to market efficiencies but virtually devoid of references to consumers or citizens.

It's been difficult for me to watch a group of colleagues whom I genuinely respect, like and admire move in a direction with which I so strongly disagree. I feel compelled to speak out, but take no joy in taking such strong exception.

The majority implies that Congress and the courts forced this outcome. I disagree. We had much wider latitude than this suggests. The biennial review provides a simple directive – to determine whether the rules "are necessary in the public interest as the result of competition," repealing or modifying them only if we deem them "no longer in the public interest."

The linchpin of Congress's statutory guidance is two words – public interest. The American citizenry should benefit from each decision. All American citizens must benefit, including minorities, women, and non-English speaking citizens.

In the context of media ownership, no matter what others think the Circuit Court may have implied, the FCC still has a special duty to protect what the Supreme Court referred to as an "uninhibited marketplace of ideas."

I'm afraid this decision departs dramatically from our statutory mandate, which is to establish rules in the "public interest, convenience, and necessity." Let me explain why today I think we fail to meet even that flexible, broad standard.

Judging from our record, public opposition is nearly unanimous, from ultra-conservatives to ultra-liberals, and virtually everyone in between. We have received about three-quarters of a million comments from the public in opposition to relaxing our ownership rules, a new record, and only a handful in support. Of the hundreds of citizens I heard from directly at field hearings across the country, not one stood up to call for relaxing the rules. Of the thousands of e-mails I personally received, I saw only one didn't oppose allowing further media concentration.

The American people appear united in believing that media concentration has gone too far already and should go no further.

I've heard it said we can't make this decision by polls or by weighing postcards. Fair enough.

But the statute doesn't let us simply dismiss the public's views with a passing reference in one paragraph, as this item currently does. The public apparently has no interest in further media concentration. Does the majority really know what's better for the public than the three quarters of a million citizens who are motivated enough to contact the Commission or attend field hearings? We should not assume that those people who took the time to alert us to their deep-seated concerns, with 99.9 percent in opposition, are wrong unless there is overwhelming evidence proving it. Here, just the opposite is true. There is plenty of evidence the people are right.

The public is joined by bipartisan chorus of caution from over 150 Members of Congress. Organizations from nearly every political stripe, from the National Rifle Association to the National Organization for Women, expressed grave doubt about the wisdom of allowing greater consolidation. We heard from artists, academics, media moguls -- Republicans, and Democrats.

It has been said that the public comments we received are too simple and offer no substantive basis from which to make our decision. I beg to differ. I have read a lot of their comments, and I've listened to hundreds of people firsthand in city halls, schools churches and meeting rooms.

Let me tell you, the Americans we heard from know what they're talking about. This is the media they view every day. They take it very personally, and they are very articulate and substantive in what they say.

We have heard from people who have collectively spent billions of hours watching TV, listening to the radio and

reading newspapers. There is no better expert witness than the American people. There is no more objective jury.

But today's decision overrides their better judgment. It instead relies on the reasoning of a handful of powerful media companies who have a vested financial interest. Those who stand to benefit by buying and selling the public airwaves won out over the public.

Anyone who questions whether consolidation can cause harm need only look to the experience of radio. The most constant refrain I heard from coast to coast was complaints about the homogenization and loss of news coverage on the radio dial since 1996. People begged us not to let happen to television what happened to radio. But the majority did not heed this concern. By ignoring this history, we may be destined to repeat it. Radio is a very sick canary in the coal mine, and we're about to infect television with the same disease.

I suggested and would have taken another approach. This Order often equates the public interest with the economic interests of media conglomerates. It assumes that efficiencies and cost savings created by mergers will translate into benefits for the public. But it makes no effort to ensure that will actually happen.

We could have easily addressed these concerns. I share the view that given changes in the marketplace, some of these combinations may make sense. I could have supported greater flexibility to evaluate mergers on a case-by-case, market-by-market analysis. That is the only true way to determine if media mergers of this magnitude would actually benefit the public. But the only way to determine the value of a given merger is for the Commission to request companies that seek to merge to demonstrate how, in the case of those particular entities in those particular markets, any efficiencies gained by the merger would be channeled into something positive for the viewing public.

The majority rejected such an approach in favor of bright line rules. They refused even to ask parties that seek to merge to say anything about how many news staff would be retained, the number of hours of local programming planned, cross-programming plans for TV duopolies or the overall impact on news and public affairs programming.

Their stated goal is to achieve more market certainty for entities that seek to merge. They proudly note that establishing set rules facilitates transactions, reduces costs and makes deals more attractive to the capital markets. Another stated goal is to avoid the administrative burden that a case-by-case approach would impose upon the Commission.

The Order actually makes a special effort to proclaim the Commission has no interest in the facts of particular cases since the new rules are the be-all and end-all of what's in the public interest. This implies the Order divined some sort of higher truth as to what works best in every case for the American people. It says we don't want to be bothered with facts that might point in another direction.

In its rigid insistence on fixed rules based on oftentimes arbitrary numbers, the Order ignores our statutory obligation to serve the public interest, convenience, and necessity in favor of the convenience of those who seek to maximize the money they can extract from private sale of the public airwaves. And it favors the Commission's administrative "convenience" ahead of the public interest. We are here to carry out the statute, not subvert it with the excuse that it's too much work to implement. This just won't do when our very democracy is at stake.

The majority's approach simply assumes that if we let media companies merge, they will channel the resulting efficiencies into better programming for the public. Broadcasters have a long and proud tradition of public service I know many will want to carry on. But in the absence of some other compulsion, the logic of marketplace competition and the media companies' fiduciary responsibility to shareholders will require them to

maximize profits rather than serve the public interest. The record does not support the dangerous assumption that the many mergers contemplated under these rules will invariably serve the public interest.

One argument in favor of unleashing the media giants is that free over-the-air television is threatened. That's a worthy goal, but the rumors of its demise, widely spread, are greatly exaggerated.

In reality, just last month, broadcast network advertisers spent a record $9.4 billion in upfront sales for next season, up 13 percent. The Wall Street Journal recently reported that some networks make $600-$700 million, though others are less profitable.

It is quite telling that the best case for consolidation is that the networks need to make still more. It's not the FCC's job to make sure every big TV network makes money – that's up to network management. Our first priority is ensuring the American people get a wide range of diverse viewpoints.

The day we will know over-the-air TV is in real trouble is when broadcasters start lining up to turn back their licenses. Today, instead, the value of television stations continues to skyrocket because these licenses are so scarce. One station in Los Angeles sold for $800 million. Why are the networks so interested in increasing the nationwide cap or acquiring triopolies or duopolies in local markets if this business is on the way down?

It violates every tenet of a free democratic society to let a handful of powerful companies control our media. The public has a right to be informed by a diversity of viewpoints so they can make up their own minds. Without a diverse, independent media, citizen access to information crumbles, along with political and social participation. For the sake of our democracy, we should encourage the widest possible dissemination of free expression through the public airwaves.

Some argue that the concern about the threat to American democracy is overblown since it is so strong and resilient. While our democracy is strong and not about to crumble, does it mean we can afford to weaken it? Doesn't it matter that only half our citizens vote? The same people argue there is plenty of diversity already, so we can afford to lose some. I just don't agree.

Despite the Order's assumption that technological advancements render broadcasters just another voice in a crowd of ever-expanding and fungible media channels, a simple fact remains. No technological advances have made it possible for every person who wants to broadcast in a local community to do so. Nobody yet has figured out how to replicate the spectrum for everyone who wants to broadcast a message. The exclusive right to use the broadcasting spectrum denies it to all others.

The majority completely ignores the reality that neither cable nor the Internet has changed the huge market power granted by federal license to use scarce broadcast spectrum, particularly when that license comes with the requirement to be carried on cable.

It also ignores that people still get the vast bulk of their local news and information from the same places they always have: their local newspaper and local TV stations. And these are the very outlets we are giving the most new flexibility to merge.

Today's bottom line spells an open season on consolidation. In place of our once powerful cross-media limits, only 2.3 percent of the American population will now receive full diversity protection. In contrast, the markets where all remaining cross-media protections have been entirely lifted represent 72.58 percent of the population.

While I agree that some consolidation may be warranted in the very top markets, the leap from protecting 100 percent of the population with full cross-newspaper/broadcast protections

to less than 3 percent is dramatic. We are moving to a world where in larger markets one owner can combine the cable system, three television stations, eight radio stations, the dominant newspaper, and the leading Internet provider, not to mention cable networks, magazine publishers and programming studios which could produce the vast bulk of the programming available to those outlets. In my view, it is no exaggeration to say the rules now permit the emergence of a 21st Century Citizen Kane on the local level, with perhaps a handful of Citizen Kanes on the national level.

In smaller markets, say the town of Great Falls, Montana with a population of 56,690, under our new rules one entity could own the cable company, the dominant television station, the dominant newspaper, and multiple radio stations. Is this safe for democracy?

We have heard that relaxing the rules is appropriate because so many Americans can now access so many channels, the Internet and other media. But it turns out the same few vertically-integrated global media firms own the bulk of what people see. Ownership has become more concentrated. A person can always add more electrical outlets throughout their home, but that doesn't mean they will get their electricity from new sources. The same goes for media outlets.

And we cannot ignore that many citizens have no access to these wonderful new options. Until every American can effectively access these outlets, this Commission should protect the diversity available in the outlets that serve their needs.

Our task, therefore, should be to encourage maximum diversity, not assure a four-voice or six-voice sliver of it. This Order, to the contrary, concludes that there is plenty of diversity already, so we can afford to sacrifice some and have enough left over.

The public interest means more than just efficiencies and cost savings. Every community has local needs, local elections,

local news, local talent, and local culture. While localism reflects a commitment to local news and public affairs programming, it also means much more. It means providing opportunities for local self-expression and reaching out to, developing and promoting local talent. It means making programming decisions to serve local needs. It means allocating resources to address the needs of the community. Localism's many virtues are hard to capture, but may get easier to ignore as companies consolidate.

When this full document is finally made public, I expect it will be torn apart by media experts, academics, consumer groups, activists, and most of all, the American people. They will find it riddled with contradictions, inconsistencies, false assumptions and outcome-driven thinking.

I would like to recount some of the most glaring inconsistencies and flawed reasoning behind these new rules. I've got a much longer written critique I will release soon, but will spare you now by summarizing some highlights.

In perhaps the Order's most inexplicable inconsistency, the Majority decides to retain a 50 percent discount for UHF stations in the national television cap, yet fails to apply comparable treatment to the local television rule and cross-media limits. To discount some stations for one rule while failing to do so in others is arbitrary and unjustifiable. If the purpose of this exercise is to update our rules in light of technological developments, we can't ignore some just because we don't like the outcome of more stringent limits.

In perhaps the most blatant evidence of a results-driven process, the Majority goes out of its way to allow companies to seek waivers of the new bright line rules to achieve greater concentration, while it attempts to deny the statutory right of opponents of mergers to petition to deny a given transaction. It is fundamentally unfair to allow waivers for corporate interests in extenuating circumstances without the corresponding protections to the public.

The Diversity Index was a noble effort that tragically degenerated into an ill-conceived rote formula that even Merlin couldn't decipher. The index is seemingly nothing more than economic jujitsu, an ornate castle built upon a foundation of sand at the ocean's edge.

After detailing at length the new formula and its underpinnings, the Majority stresses that the index is used only as a basis to draw bright-line rules. But the order specifically denies any person the right to apply this new magical formula to a particular market. In other words, no one can use the FCC's own new methodology to show that an application in a particular market harms the public interest.

Among its many flaws, the index distorts how it calculates the market shares of relevant providers in each local market, resulting in grossly understated measurements of the impact of any particular combination. For example in New York, it treats the Shop At Home TV station the same as the local NBC station. Similarly, with respect to newspapers, the index treats the New York Times the same as the Polish Daily News.

Despite the quest for empirical footing, the index is premised on admittedly incomplete data. Recognizing that the Nielsen study failed to ask the specific question of the source of local news, the majority marches ahead, cobbling its own data points on local news sources from selective answers to muddled questions.

Against all notions of consistency, the majority unwisely decides that even if a broadcaster is restricted from acquiring a newspaper, the broadcaster can still buy the paper and hold it until its next renewal period – a period of 8 years. This simply underscores the outcome-driven nature of this Order.

On the radio front, the retention of some local radio rules appears an acknowledgment by the majority that they couldn't stomach the fallout from the rapid consolidation of the past

seven years. And some actual improvements were made in the market definitions.

Yet, for all the talk about tightening the radio rules, in several important respects the Order actually further unleashes the industry. It eliminates the radio-TV cross ownership rule. And it eliminates the current limit on the audience or advertising share any one owner can gain through mergers in a local market. For a rule designed solely to address competitive effects of mergers, it is mystifying why the majority would cast aside such a fundamental and economically sound principle as accounting for the measure of power of combined stations. The revised rule now clears the way for mergers that previously were denied or designated for hearing due to the strong likelihood of negative competitive effects.

The Order includes a helpful provision that allows only small businesses --initially -- to buy grandfathered groups of radio clusters that no longer comply with the new market definition. While useful, it may not get used much. Small businesses will encounter great difficulty in raising the capital necessary to buy expensive, large clusters, if they ever even come on the market at all. This is especially true given that the seller could peel off one or two stations and then sell both the remaining cluster and the spin-off stations with no restrictions to an unlimited pool of potential buyers, which will limit the exclusivity of the eligible entity buyer pool.

In my view, adding an admittedly helpful provision that potentially affects a only a handful of stations, if it ever gets used at all, doesn't come close to offsetting the sad truth that small businesses, including those owned by minorities and women, are going to find it even harder in more concentrated and expensive media markets to raise capital, own outlets or have their unique voices heard.

Most alarming is that after only three years, the small business can flip the grandfathered cluster to any large radio or media conglomerate like Clear Channel. Making this approach

so ripe for abuse further diminishes the likelihood that it will serve much of a useful purpose, since real disadvantaged businesses will have to bid against companies that plan to sell to well-capitalized radio giants, raising the price of clusters. The ultimate beneficiaries of this approach could be companies like Clear Channel that could add even more grandfathered clusters than it currently controls.

Today the Commission introduces a new behemoth into our media landscape: a TV triopoly. Where is the empirical evidence supporting this creation in our record? As unjustified by evidence as it may be, this leap is in only nine of top TV markets.

More troubling is the leap in the number of duopolies now permitted. Duopolies are now restricted to sizable markets. But this Order expands duopolies to 162 out of 210 markets, or 95.4 percent of the population. I can't fathom why we would allow such dramatic consolidation across the board with no analysis as to how this will impact individual markets. It's a breathtaking assumption that each of these mergers, all of which will eliminate a local voice, is in the public interest. And I don't believe the record justifies it.

I do believe the record demonstrates that further concentration of power in the hands of networks justifies retention of the national network cap at the 35 percent level set by Congress.

The majority has not adequately justified the selection of a new 45 percent cap. It relies exclusively on evidence showing that the largest network station owners possess no greater bargaining power, measured by prime time preemptions, than the smallest network station. This is a thin reed on which to justify a 10-point increase. Moreover, without access to more data, this conclusion is unconvincing.

In the end, we have yet another tradeoff between efficiencies and public interest goals such as localism. Guess who wins.

The social benefit of locally originated and oriented programming and program selection to me outweighs the efficiencies of further vertical integration.

Finally, let me explain why I cannot join the majority in voting for retention of the dual network rule. I disagree with the Order's conclusion that diversity no longer underpins this rule. But more importantly, a more rigorous examination of this rule must be conducted in light of the rising tide of Spanish-language broadcasting networks. Just as the rule is retained for the top-four English-language networks, so too should Spanish broadcasting be examined separately. The rapid growth of the Spanish language media in the past several years is having a significant effect on the landscape in which broadcast networks operate. I believe that these developments require us to consider whether to afford Spanish-speakers the same protections available to English-speaking television audiences.

Looking back on how we got here, I am convinced there is little else I could have done to change the outcome. In an effort to moderate the extreme proposals that emerged, I offered suggestions to my colleagues which unfortunately were not incorporated. The turning point when I realized I could not likely support this proposal was when a majority settled on the notion that bright line rules were preferable to making market-by-market determinations as to whether mergers served the public interest.

The Supreme Court has said that "promoting the widespread dissemination of information from a multiplicity of sources" is of the highest order. So safeguarding diversity should not be subject to abstract diversity scenarios or arbitrary decisions that reduce the number of voices people can hear.

I don't mean to suggest that bigness is always bad, or that free enterprise will always fail the public. There is some truth to the arguments that my colleagues make today. There's nothing inherently wrong with earning profits from using public property.

But when it comes to gaining even greater profits at the expense of the cornerstones of our democracy, we must carefully question the effect on the public. Today's rules just don't let the big get bigger, they will effectively prevent smaller entities from breaking in. I would have relaxed the rules more incrementally and shown the public each time how it would benefit.

Since my arrival here 5 months ago, I have approached this proceeding with a constructive frame of mind. I sought to understand the various proposals and their underpinnings, and offer my views on their efficacy. Even after others closed in on an approach with which I could not get comfortable, I made reasonable attempts to moderate the proposals -- which were refused. In the end, it wasn't the process that precluded me from participating in drafting and supporting today's Order. It was the substantive direction the item took and the results-driven imposition of bottom line, bright line rules ahead of all else. I am disappointed that a majority of my colleagues could not be persuaded to take a more reasoned, conservative, case-by-case approach.

This is far from over. Congress may prove more responsive to the citizens who passionately plea for the independence and diversity of their media. To paraphrase Winston Churchill, this is not the end, or even the beginning of the end, but just the end of the beginning.

Supreme Court, U.S.
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Nos. 04-1020, 04-1033, 04-1036, 04-1045, and 04-1177

In the Supreme Court of the United States

MEDIA GENERAL, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

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ON PETITIONS AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Section 202(h) of the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 111-112, requires the Federal Communications Commission to determine periodically whether its rules governing ownership of federally licensed broadcast stations remain "necessary in the public interest," and to "repeal or modify" any such rule that the FCC determines is "no longer in the public interest." Pursuant to that directive, the FCC determined in this case to: (1) replace its ban on cross-ownership of daily newspapers and broadcast stations with a cross-media rule that permits such combinations in most markets; (2) relax its local television ownership rule to generally allow common ownership of two or (in larger markets) three television stations; and (3) modify its local radio ownership rule by tightening the rule in some respects and loosening it in other respects. The questions presented are:

1. Whether the FCC's revised broadcast ownership rules violate the First or Fifth Amendment rights of newspaper owners and broadcast station licensees.

2. Whether the FCC's revised broadcast ownership rules violate Section 202(h) of the 1996 Act.

3. Whether the FCC's revised broadcast ownership rules are supported by a reasoned analysis under the Administrative Procedure Act.

TABLE OF CONTENTS

Page

Opinions below 2
Jurisdiction 2
Statement 2
Argument:
I. Further review is unwarranted because of the interlocutory posture of this case 12
II. The court of appeals correctly rejected petitioners' constitutional challenges to the FCC's broadcast ownership regulations 15
A. The FCC's broadcast ownership rules are not subject to heightened scrutiny under the First Amendment 15
B. The cross-media rule does not violate the due process or equal protection principles of the Fifth Amendment 22
III. Section 202(h) does not impair the Commission's authority to adopt and revise its ownership rules 24
IV. The conditional cross-petition in No. 04-1177 should be denied 26
Conclusion 28

TABLE OF AUTHORITIES

Cases:

American Hosp. Ass'n v. *NLRB*, 499 U.S. 606 (1991) 24
Brotherhood of Locomotive Firemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967) 12
Cellco P'ship v. *FCC*, 357 F.3d 88 (D.C. Cir. 2004) 5, 26

Cases—Continued: Page

Chesapeake & Potomac Tel. Co. v. *United States*, 42 F.3d 181 (4th Cir. 1994) 23
FCC v. *League of Women Voters.*, 468 U.S. 364 (1984) 15, 20
FCC v. *National Citizens Comm. for Broad.*, 436 U.S. 775 (1978) ..... *passim*
Fox Television Stations, Inc. v. *FCC*, 280 F.3d 1027 (D.C. Cir.), modified on reh'g, 293 F.3d 537 (D.C. Cir. 2002) 4, 5, 16, 22, 25
Leathers v. *Medlock*, 499 U.S. 439 (1991) 22
McConnell v. *FEC*, 540 U.S. 93 (2003) 19
Minneapolis Star & Tribune Co. v. *Minnesota Comm'r of Rev.*, 460 U.S. 575 (1983) 22
Minnick v. *California Dep't of Corr.*, 452 U.S. 105 (1981) 14
National Broad. Co. v. *United States*, 319 U.S. 190 (1943) 3, 14, 16, 17, 22
News Am. Pub'g, Inc. v. *FCC*, 844 F.2d 800 (D.C. Cir. 1988) 23
Pennsylvania Dep't of Corr. v. *Yeskey*, 524 U.S. 206 27
Porter v. *Warner Holding Co.*, 328 U.S. 395 (1969) 26
Radio-Television News Dirs. Ass'n v. *FCC*, 229 F.3d 269 (D.C. Cir. 2000) 20
Red Lion Broad. Co. v. *FCC*, 395 U.S. 367 (1969) 19
Reno v. *ACLU*, 521 U.S. 844 (1997) 18
Rescue Army v. *Municipal Ct.*, 331 U.S. 549 (1947) 14

Cases—Continued: Page

Sinclair Broad. Group, Inc. v. *FCC*, 284 F.3d 148 (D.C. Cir. 2002) 5, 16, 25
Spector Motor Serv. v. *McLaughlin*, 323 U.S. 101 (1944) 13
Telecommunications Research & Action Ctr. v. *FCC*, 801 F.2d 50 (D.C. Cir. 1986) 16
Turner Broad. Sys. v. *FCC*, 512 U.S. 622 (1994) 17, 18, 22, 23, 27
United States v. *Storer Broad. Co.*, 351 U.S. 192 (1956) 3
U.S. West v. *United States*, 48 F.3d 1092 (9th Cir. 1994) 23
Virginia Military Inst. v. *United States*, 508 U.S. 946 (1993) 12
Ward v. *Rock Against Racism*, 491 U.S. 781 (1989) 22
Watson v. *Buck*, 313 U.S. 387 (1941) 14
Weinberger v. *Romero-Bracelo*, 456 U.S. 305 (1982) 26

Constitution, statues and rule:

U.S. Const.:
Amend. I 8, 12, 16, 19, 27
Amend. V 8, 12, 22
Communications Act of 1934, 47 U.S.C. 151 *et seq.* 2
47 U.S.C. 161 (§ 11) 5
47 U.S.C. 301 ..... 2, 3, 17
47 U.S.C. 309(a) 3, 15, 17
47 U.S.C. 309(h) 3
47 U.S.C. 309(k) 3

Statutes and rule—Continued: Page

47 U.S.C. 310(d) 3, 17

Consolidated Appropriations Act, 2004 Pub. L. No. 108-109, Div. B, § 629, 118 Stat. 99 ..... 4, 8

Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, 102 Stat. 2216-2217 21

Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. No. 100-162, 103 Stat. 1020-1021 21

Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1991, Pub. L. No. 101-515, 104 Stat. 2136 21

Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-140, 105 Stat. 797 21

Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-395, 106 Stat. 1846 21

Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-121, 107 Stat. 1166-1167 21

Department of Commerce, Justice, and State, the Judiciary, and Agencies 1995 Appropriations and 1994 Supplemental Appropriations Act, Pub. L. No. 103-317, 108 Stat. 1738 21

Statutes and rule—Continued: Page

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 4
§ 202(a)-(f), 110 Stat. 110-111 ..... 4, 7, 25
§ 202(h), 110 Stat. 111-112 ..... 4, 6, 9, 12, 25
28 U.S.C. 2112(a)(3) 8
Sup. Ct. R. 10 15

Miscellaneous:

Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965) 20
Repeal or Modification of the Personal Attack and Political Editorial Rules, In re, 15 F.C.C.R. 19,973 (2000) 20
Robert Stern et al., *Supreme Court Practice* (8th ed. 2002) 12
Syracuse Peace Council, In re, 2 F.C.C.R. 5043 (1987), aff'd, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990) 19
2002 Biennial Regulatory Review, 77 F.C.C.R. 18,503 6
U.S. Dep't of Justice & FTC, *Horizontal Merger Guidelines* (rev. Apr. 8, 1997) 10

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-190a[1]) is reported at 373 F.3d 372. The report and order of the Federal Communications Commission (Pet. App. 206a-723a) is reported at 18 F.C.C.R. 13,620.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 2004. A petition for panel rehearing was granted in part on September 3, 2004 (Pet. App. 191a-193a). On November 22, 2004, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including January 3, 2005, and on December 21, 2004, Justice Souter further extended the time within which to file a petition for a writ of certiorari to and including January 31, 2005. The petitions in Nos. 04-1020, 04-1033, 04-1036, and 04-1045 were filed on January 28 and January 31, 2005. The cross-petition in No. 04-1177 was filed on March 2, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Communications Act of 1934 (Communications Act), 47 U.S.C. 151 *et seq.*, establishes a comprehensive framework for federal regulation of the transmission and use of radio signals in the United States. The Act establishes a federal policy of "maintain[ing] the control of the United States over all the channels of radio transmission" and "provid[ing] for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority." 47 U.S.C. 301. The Act thus requires persons seeking to engage in radio or television broadcasting to obtain a broadcast license

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[1] Unless otherwise indicated, "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 04-1020.

for a limited, but renewable, period of time from the Federal Communications Commission, *ibid.*, and prohibits the assignment or transfer of any such license without the Commission's prior approval, 47 U.S.C. 309(h), 310(d).

Before it may grant, renew, or approve the assignment or transfer of a broadcast license, the Commission must conclude that such action would serve the "public interest, convenience, and necessity." 47 U.S.C. 309(a), 310(d); see 47 U.S.C. 309(k). Among the policies the Commission has advanced in exercising its broadcast licensing responsibilities is a policy favoring diversification of mass media ownership as benefiting the public interest "by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power." *FCC* v. *National Citizens Comm. for Broad.*, 436 U.S. 775, 780 (1978) (*NCCB*).

To facilitate even-handed implementation of its policies and to provide certainty to the broadcast industry, the Commission has adopted generally applicable regulations that embody its judgments about the circumstances in which the issuance, assignment, or transfer of a broadcast station license would serve the public interest. See, *e.g.*, *United States* v. *Storer Broad. Co.*, 351 U.S. 192, 202-205 (1956). Those regulations have long imposed limits on the number of radio or television stations a single party may own nationally or in a local market, as well as limits on cross-ownership of broadcast stations and other media in the same market. See, *e.g.*, *ibid.* (upholding ownership limits on radio and television stations); *NCCB*, 436 U.S. at 793-802 (upholding prohibition on cross-ownership of daily newspapers and broadcast stations). The Commission deems proposed broadcast combinations that violate its ownership limits inconsistent with the public interest, absent a showing that waiver of a rule is warranted in a particular case. See *id.* at 793; *Storer Broad. Co.*, 351 U.S. at 205; *National Broad. Co.* v. *United States*, 319 U.S. 190, 225 (1943) (*NBC*).

2. In the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, Congress directed the Commission to make a number of changes to its broadcast ownership rules. See 1996 Act § 202(a)-(f), 110 Stat. 110-111. In addition, Section 202(h) of the 1996 Act imposed a general duty on the Commission to review its ownership rules periodically to determine "whether any of such rules are necessary in the public interest as the result of competition," 110 Stat. 112, and to "repeal or modify any regulation it determines to be no longer in the public interest." *Ibid.* Section 202(h) originally directed the Commission to review its ownership rules biennially, 110 Stat. 111, but in 2004, while this case was pending in the court of appeals, Congress amended the statute to provide for Commission review every four years. Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, Div. B, § 629, 118 Stat. 99.

In a pair of cases decided in 2002, the D.C. Circuit examined the effect of Section 202(h) on the Commission's authority to regulate broadcast ownership in the public interest. First, in *Fox Television Stations, Inc.* v. *FCC*, 280 F.3d 1027, modified on reh'g, 293 F.3d 537 (2002), the D.C. Circuit examined the Commission's decision in the first biennial review under Section 202(h) to retain without modification existing rules on national television station ownership and on cross-ownership of television stations and cable systems in local markets. The court emphasized that "nothing in § 202(h) signals a departure from [the] historic scope" of the Commission's public interest authority. *Id.* at 1042. The court concluded that Section 202(h) requires the Commission, if it decides to retain a particular ownership rule, to provide an adequate explanation for its decision that accounts for the state of competition in the relevant media markets.[2] See *id.* at

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[2] The *Fox* panel initially interpreted the phrase "necessary in the public interest" in Section 202(h) to mean that a "regulation should be retained only insofar as it is necessary in, not merely consonant with, the public interest." 280 F.3d at 1050. On rehearing, the panel modified its decision to leave open

1042, 1044. Because, in the court's view, the Commission had not adequately explained its decision to retain the national television and cable-television cross-owner rule, the court remanded those rules to the Commission for further consideration. [3]

In *Sinclair Broadcast Group, Inc.* v. *FCC*, 284 F.3d 148 (2002), the D.C. Circuit remanded (but did not vacate) the Commission's 1999 revision of the local television ownership rule. The revised rule allowed common ownership of two television stations in a local market where neither station is among the top-four rated stations in the market (the "top-four" test) and the market contains at least eight other "voices," which the Commission defined as independently owned and operating, full-power television stations. The *Sinclair* court recognized that the Commission "has wide discretion to determine where to draw administrative lines." *Id.* at 162, 170 (internal quotation marks omitted). The court remanded the rule, however, because it concluded that the Commission had not adequately explained why it counted only television stations as voices in the local television ownership rule, while counting other media outlets (including daily newspapers and cable systems) as voices in its rule governing cross-ownership of radio and television stations. *Id.* at 164.

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the question of the standard that the Commission must meet under Section 202(h). 293 F.3d at 541. In *Cellco Partnership* v. *FCC*, 357 F.3d 88 (2004), the D.C. Circuit subsequently held that the Commission reasonably interpreted similar language in Section 11 of the Communications Act, 47 U.S.C. 161, to require it only to "reevaluate regulations in light of current competitive market conditions to see that the conclusion [it] reached in adopting the rule—that [the rule] was needed to further the public interest—remains valid." 357 F.3d at 98 (internal quotation marks omitted).

[3] Although the *Fox* court vacated the cable-television cross-ownership restriction, it remanded the national television ownership rule without vacating it because the court concluded that the Commission might be able to justify retention of the rule on remand. 280 F.3d at 1049.

3. In September 2002, the Commission initiated its third biennial proceeding under Section 202(h) to review its broadcast ownership rules. *2002 Biennial Regulatory Review*, 17 F.C.C.R. 18,503 (2002). The 2002 biennial review sought comment on the D.C. Circuit's decisions in *Fox* and *Sinclair*. *Id.* at 18,508-18,512 ¶¶ 12-19. The proceeding also incorporated other rulemaking proceedings that the Commission had previously initiated to reexamine its regulations governing local radio station ownership and cross-ownership of daily newspapers and broadcast stations. *Id.* at 18,506 ¶ 7.

The consolidated biennial review proceeding culminated on July 2, 2003, with the release of the Report and Order at issue in this case. As relevant here, the Report and Order established a single new cross-media rule to govern cross-ownership of daily newspapers, television stations, and radio stations, and modified two other rules that limit common ownership of multiple radio and multiple television stations in a local market.

Cross-media rule. The cross-media rule replaced, *inter alia*, the blanket prohibition on common ownership of daily newspapers and broadcast stations that this Court upheld in *NCCB*. The cross-media rule prohibits combinations involving a daily newspaper and a broadcast station, or a radio station and a television station, in local markets with three or fewer television stations. Pet. App. 521a-522a (Order ¶ 454); 04-1036 Pet. App. 661a. In local markets that have four to eight television stations, such cross-media combinations are permitted with certain limitations. Pet. App. 530a (Order ¶ 466); 04-1036 Pet. App. 661a. In local markets with nine or more television stations, the Commission imposed no cross-media limit. Pet. App. 534a (Order ¶ 473).

Local television ownership rule. In response to the decision in *Sinclair*, the Commission relaxed the local television ownership rule by replacing the "eight-voice" test with a tiered approach in which ownership limits are tied to the number of television stations in the market. Under the revised rule, a party may

own two commercial television stations in individual markets with 17 or fewer television stations and three commercial stations in markets with 18 or more television stations. Pet. App. 290a-291a (Order ¶ 134); 04-1036 Pet. App. 660a-661a. The revised rule continues to prohibit combinations involving the four highest-rated television stations in the market. Pet. App. 331-332a (Order ¶ 186); 04-1036 Pet. App. 661a. That "top four" restriction thus precludes common ownership of multiple television stations in markets with four stations or fewer.

Local radio ownership rule. The Commission did not modify the numerical limits in the local radio ownership rule, which Congress had directed the Commission to establish in the 1996 Act. See 1996 Act § 202(b), 110 Stat. 110. The Commission did revise the method of determining the scope of the radio market to which the fule's numerical limits apply, Pet. App. 390a-391a (Order ¶¶ 273-274); it required inclusion of noncommercial radio stations when counting the number of radio stations in the market, *id.* at 408a (Order ¶ 295), see 04-1036 Pet. App. 659-660a; and it counted certain agreements concerning the sale of radio advertising (commonly called "Joint Sales Agreements") as ownership interests for purposes of applying the ownership limits, Pet. App. 422a-429a (Order ¶¶ 316-325); see also 04-1036 Pet. App. 664a-665a.[4]

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[4] The 2002 biennial review also addressed two other rules related to ownership of television stations. The Commission decided to retain its "dual network" rule, which prohibits mergers among the top-four broadcast television networks (ABC, NBC, CBS, and Fox). Pet. App. 610a-629a (Order ¶¶ 592-621). That decision was not challenged in the court of appeals. In addition, the Commission relaxed its national television ownership rule to allow common ownership of television stations that reach 45% (as opposed to the previous limit of 35%) of the national television audience. *Id.* at 552a-610a (Order ¶¶ 499-591). In 2004, while this case was pending before the court of appeals, Congress amended the 1996 Act to increase the national television audience reach limitation from 35% to 39%, and provided that rules relating to that limitation would no longer be subject to the now-quadrennial review

4. Petitions for review were filed in several circuits, triggering a judicial lottery under 28 U.S.C. 2112(a)(3). The Third Circuit was selected to review the Commission's decision. On September 3, 2003, the court of appeals stayed the Commission's revised rules pending its review of the Report and Order. Pet. App. 194a-196a. The court also declined to transfer the case to the Court of Appeals for the District of Columbia Circuit. *Id.* at 197a-205a.

5. a. On June 24, 2004, the Third Circuit issued its decision on the merits. All three judges on the panel determined that the Commission's limits on broadcast ownership do not violate the First and Fifth Amendment rights of newspaper owners and broadcasters. Pet. App. 45a-48a.[5] The court stated that petitioners' First Amendment arguments were foreclosed by *NCCB*, in which this Court upheld the nationwide ban on newspaper-broadcast cross-ownership as "a reasonable means of promoting the public interest in diversified mass communications." *Id.* at 46a (quoting *NCCB*, 436 U.S. at 802). In addition, the court stated that, even if *NCCB* did not control, it would assess petitioners' First Amendment challenge under rational-basis review in light of the continuing physical scarcity of broadcast spectrum. *Id.* at 47a (noting that "many more people would like access to [broadcast spectrum] than can be accommodated"). Similarly, the court of appeals concluded that petitioners' equal protection claims were foreclosed by this Court's rejection in *NCCB* of an equal protection challenge to the newspaper-broadcast cross-ownership restriction. *Id.* at 45a-46a. The court added that the devel-

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process. Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, Div. B, § 629, 118 Stat. 99. The court of appeals in this case found that the challenge to that limitation was thereby rendered moot. See Pet. App. 36a-38a.

[5] Although Chief Judge Scirica did not join the panel majority's analysis of the petitioners' constitutional claims, his conclusion that the Commission's ownership rules should have been affirmed is an implicit rejection of such claims. See Pet. App. 190a.

opment of more media outlets since *NCCB* was not a basis for reaching a different result, because it could not be "assumed that these media outlets contribute significantly to viewpoint diversity as sources of *local* news and information." *Id.* at 46a (emphasis added).

The court likewise rejected petitioners' arguments that Section 202(h) of the 1996 Act limited the Commission's authority to adopt more restrictive ownership rules and imposed a heightened burden on the Commission to justify any ownership limits that it decides to retain. Pet. App. 26a-36a; see *id.* at 124a (Scirica, J., dissenting) ("[T]he statute does not foreclose the possibility of increased regulation under the biennial review if the Commission finds such action in the public interest.").

b. In a portion of the panel opinion from which Chief Judge Scirica dissented, the court of appeals concluded that the Commission's cross-media rule and local television and radio rules should be remanded for "additional justification or modification." Pet. App. 12a. For each of the three rules, the majority rejected the specific limits that the Commission had adopted (or, in the case of the local radio rule, retained). The majority emphasized that it was not passing final judgment on the ultimate permissibility of the particular ownership limits chosen by the Commission. Instead, the court stated, "the Commission gets another chance to justify its actions." *Id.* at 12a n.3.

Cross-Media Rule. The court of appeals held that the Commission's determination that "the blanket ban on newspaper/broadcast cross-ownership was no longer in the public interest" was "justified under § 202(h) [of the 1996 Act] and is supported by record evidence." Pet. App. 40a; see *id.* at 40a-44a. But the court concluded that some aspects of the Commission's new cross-media rule, which replaced the newspaper/broadcast cross-ownership ban, were not supported by a "reasoned analysis." *Id.* at 48a. The majority focused its criticism on the Commission's use of a Diversity Index, a tool based loosely on the

Herfindahl-Hirschman Index used in antitrust analysis, to inform its judgment in setting ownership limits for local media markets of various sizes. See *id.* at 49a. In particular, the majority rejected the Commission's decision to evaluate diversity by assigning equal weight to "all outlets within the same media type (that is, television stations, daily papers, or radio stations)." *Id.* at 58a. The court also found the Diversity Index flawed because, in the view of the panel majority, it "gave too much weight to the Internet as a media outlet," *id.* at 49a, and "allow[ed] some combinations where the increases in Diversity Index scores were generally higher than for other combinations that were not allowed," *id.* at 63a.

Local Television Ownership Rule. The court of appeals likewise remanded, for further consideration by the agency, the specific local television ownership limits that the Commission had adopted. Pet. App. 76a-79a. In constructing the local television rule, the Commission had begun with the goal of preserving six equal-sized competitors (see *id.* at 335a-336a (Order ¶ 192)), and, except for purposes of applying the top-four restriction, it treated each television station in the market as having equal significance. *Id.* at 76a. The court upheld the Commission's decision to retain the top-four restriction. But, in line with its analysis of the cross-media limits, the panel majority stated that in its view "no evidence" supported the Commission's equal weighting of local stations in setting ownership limits and further concluded that such weighting was unreasonable insofar as it allowed concentration—as measured by audience share—to exceed a Herfindahl-Hirschman Index level of 1800. *Id.* at 78a; see generally U.S. Dep't of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* § 1.5 (rev. Apr. 8, 1997) (designating markets with a level above 1800 as "highly concentrated"). The court therefore remanded the numerical limits for local television ownership "for the Commission to support and harmonize its rationale." Pet. App. 79a.

Local Radio Ownership Rule. The court upheld much of the Commission's approach to local radio ownership, including the Commission's decision to adopt a new methodology for delineating local radio markets, Pet. App. 90a, and to count noncommercial stations and Joint Sales Agreements for purposes of applying the ownership rules, *id.* at 90a-91a, 96a-99a. But the court concluded that the Commission's decision to retain the specific ownership limits that had been adopted by Congress in 1996 was not supported by "reasoned analysis." *Id.* at 102a. In doing so, the panel majority again rejected the Commission's reliance on a benchmark that evaluated competition or diversity in terms of number of outlets rather than audience shares. *Id.* at 104a-106a. In the majority's view, "[i]t defies logic to assume that a combination of top-ranked stations is the competitive equal to a combination of low-ranked stations just because the two combinations have the same number of stations." *Id.* at 104a.

c. Chief Judge Scirica dissented from the court of appeals' decision to remand the FCC's ownership rules. In the Chief Judge's view, the majority had "substituted its own policy judgment for that of the * * * Commission." Pet. App. 108a. Noting that "[i]t is not the role of the judiciary to second-guess the reasoned policy judgments of an administrative agency acting within the scope of its delegated authority," the Chief Judge explained that he would have upheld the order on review, lifted the stay, and allowed the Commission's revised rules to go into effect. *Ibid.*

6. In issuing its decision, the court of appeals extended its stay of the Commission's revised broadcast ownership rules "pending [the court's] review of the Commission's action on remand." Pet. App. 107a. On September 3, 2004, in response to the government's petition for panel rehearing, the court partially lifted its stay to permit the Commission's revised local radio ownership rules—which the court had largely upheld—to go into effect. *Id.* at 193a. The court denied the government's rehearing

petition in other respects, however, and the cross-media limits and the local television ownership rules remain stayed.

ARGUMENT

Petitioners in this case are newspaper and broadcast industry parties, most of whom challenged the Commission's ownership regulations in the court of appeals. In Nos. 04-1020, 04-1036, and 04-1045, petitioners contend that the ownership regulations, particularly the cross-media rule, violate the First and Fifth Amendments to the United States Constitution. In Nos. 04-1033, 04-1036, and 04-1045, petitioners assert that the ownership rules under review had to be relaxed further—and could in no event be tightened—under Section 202(h) of the 1996 Act. Finally, petitioners in No. 04-1045—who intervened in the court of appeals in support of the FCC's cross-media rule—seek review of the Third Circuit's decision to remand and stay, rather than affirm, the Commission's revised ownership rules. None of the petitions raises any issue that merits further review by this Court in the present posture of the case.

I. FURTHER REVIEW IS UNWARRANTED BECAUSE OF THE INTERLOCUTORY POSTURE OF THIS CASE

1. This case is in an interlocutory posture and therefore does not provide an appropriate vehicle for addressing petitioners' claims. See, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (declining to exercise certiorari jurisdiction where the court of appeals had remanded the case); *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J.); see generally Robert Stern et al., *Supreme Court Practice* § 4.18, at 258 (8th ed. 2002). That is particularly true with respect to petitioners' constitutional claims, which ask this Court to reconsider long-established doctrines and overrule past precedents against the backdrop of an unsettled regulatory regime.

Had the Third Circuit upheld the new broadcast ownership rules, this case would have presented the question whether those otherwise-valid rules could survive the stricter constitutional standards petitioners advocate. The court of appeals, however, rejected aspects of the Commission's explanations of those rules and generally stayed the rules' effectiveness pending reconsideration by the FCC on remand. In the current posture of this case, therefore, there is an unreversed determination that the Commission failed adequately to justify the new rules under ordinary, nonconstitutional standards applicable to judicial review of administrative action. In light of that ruling, and absent this Court's review of the court of appeals' case-specific application of the Administrative Procedure Act standards to the FCC's determinations, the case does not present at this time the question whether the new rules are constitutional.

Nor does this case squarely present the question whether the prior broadcast ownership rules would satisfy the new, more stringent constitutional standard petitioners advocate. The old rules were not challenged in this proceeding and, although they are temporarily now back in force due to the Third Circuit's stay of the new rules, they are likely to be changed as a result of the remand proceedings. Petitioners' constitutional challenges are thus in effect directed to future rules—as yet unadopted—that the Commission may choose to promulgate after remand, and not to any ownership rules in place today.

As this Court has long emphasized, weighty prudential considerations counsel against unnecessary pronouncements on constitutional matters; without a concrete application of the constitutional standard to a particular governmental action or rule, the Court cannot be certain that resolution of a constitutional issue is necessary.[6] The Court's reluctance to entertain abstract issues of

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[6] See, *e.g.*, *Spector Motor Serv.* v. *McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of

constitutional law is also based on the benefits to the Court's decisionmaking process of the context provided by a particular concrete dispute; such a context is likely to help focus the Court's attention on important aspects of the legal problem and on consequences of the Court's decision that might otherwise be obscured. Because "all contingencies of attempted enforcement cannot be envisioned in advance of those applications," this Court has "found it wiser to delay passing upon the constitutionality" of a statute or regulation "until faced with cases involving particular provisions as specifically applied to persons who claim to be injured." *Watson* v. *Buck*, 313 U.S. 387, 402 (1941).

2. The interlocutory posture of the case also counsels against further review of the nonconstitutional issues presented by petitioners. In remanding the FCC's revised ownership rules, the Third Circuit correctly articulated the deferential standard of review that courts must apply in examining the Commission's ownership rules. See, *e.g.*, *NCCB*, 436 U.S. at 794; *NBC*, 319 U.S. at 219. Moreover, the court of appeals emphasized that it was not finally passing judgment on the validity of the new broadcast ownership rules, but was merely remanding for what it perceived to be an inadequacy in the Commission's justification for "certain aspects" of the new rules. Pet. App. 11a. In response to the claim that "the Commission's work * * * comes close enough to merit our approval," the court's response was "not yet." *Id.* at 12a n.3; see *ibid.* ("[T]he Commission gets another chance to justify its actions.").[7] Although the government believes the court erred in

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constitutionality * * * unless such adjudication is unavoidable."); see also *Minnick* v. *California Dep't of Corr.*, 452 U.S. 105, 122 n.30 (1981); *Rescue Army* v. *Municipal Ct.*, 331 U.S. 549, 568-569 (1947).

[7] See also Pet. App. 58a ("On remand the Commission must either exclude the Internet from the media selected for inclusion in the Diversity Index or provide a better explanation for why it is included in light of the exclusion of cable."); *id.* at 61a ("[W]e remand for the Commission's additional consideration of this aspect of the Order."); *id.* at 79a ("We remand the numerical limits for

failing to uphold the new rule, the factbound question whether the Commission adequately provided sufficient justifications for its new rules does not warrant further review. The Third Circuit's decision to remand rather than affirm was thus a "misapplication of a properly stated rule of law" that does not warrant the exercise of this Court's certiorari jurisdiction if the case is not otherwise before the Court on the merits. Sup. Ct. R. 10. The Court should deny review in this case and allow the Commission on remand to decide what broadcast ownership rules are appropriate, and to explain why they are justified.

II. THE COURT OF APPEALS CORRECTLY REJECTED PETITIONERS' CONSTITUTIONAL CHALLENGES TO THE FCC'S BROADCAST OWNERSHIP REGULATIONS

A. The FCC's Broadcast Ownership Rules Are Not Subject to Heightened Scrutiny Under the First Amendment

1. The court of appeals applied settled law when it concluded that the FCC's broadcast ownership rules must be upheld under the First Amendment if they are "rationally related to a substantial governmental interest." Pet. App. 47a. It is "well established" that Congress "has power to regulate the use of [broadcast spectrum as] a scarce and valuable national resource," and to "ensure through the regulatory oversight of the FCC that only those who satisfy the 'public interest, convenience, and necessity' are granted a license to use radio and television broadcast frequencies." *FCC* v. *League of Women Voters*, 468 U.S. 364, 376 (1984) (quoting 47 U.S.C. 309(a)). As this Court stated in *NCCB*, "nothing in the First Amendment * * * prevent[s] the Commission from allocating licenses so as to promote the 'public interest' in diversification of the mass communications media." 436 U.S. at 799. "Denial of a station license" on public interest grounds, "if

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the Commission to support and harmonize its rationale."); *id.* at 102a ("We thus remand for the Commission's additional justification.").

valid under the Act, is not a denial of free speech." *NBC*, 319 U.S. at 227.

There is no basis for Tribune's assertion (04-1036 Pet. 13) that the Third Circuit's decision creates "conflict and uncertainty" regarding the First Amendment analysis applicable to the FCC's ownership regulations. Although Tribune cites (04-1036 Pet. 14) individual judges who have expressed a range of views on the proper First Amendment analysis of broadcast regulation generally, the critical views cited by petitioners were generally directed at *content* regulation, not *ownership* regulations like those at issue here.[8] The courts of appeals that have reviewed the FCC's broadcast ownership regulations uniformly have applied the same, established standard. See *Fox*, 280 F.3d at 1046 ("the deferential review undertaken by the Supreme Court in *NCCB* and *NBC* is also appropriate here"); *Sinclair*, 284 F.3d at 168 ("Sinclair does not have a First Amendment right to hold a broadcast license where it would not [under the Commission's ownership regulations] satisfy the public interest."). There is no conflict in the circuits on the constitutional issues petitioners present.

The Third Circuit held (Pet. App. 46a), and Media General effectively concedes (04-1020 Pet. 25), that petitioners' constitutional contentions are "foreclosed" by this Court's decision in *NCCB*. Petitioners nonetheless contend (04-1020 Pet. 22-23; 04-1036 Pet. 13, 15-16; 04-1045 Pet. 26) that the growth in the number of licensed broadcast stations since *NCCB*, and the development of non-broadcast media outlets, justify overruling *NCCB* and mandating heightened scrutiny of the FCC's ownership regulations under the First Amendment. The Third Circuit correctly rejected that argument and its reliance on changed market condi-

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[8] The only decision of a court of appeals—as opposed to opinions by individual judges—cited by Tribune concerned whether the FCC could engage in "political content regulation" of broadcasting speech, *Telecommunications Research & Action Ctr.* v. *FCC*, 801 F.2d 501, 506 (D.C. Cir. 1986), and the court's discussion focused on that issue.

tions. Pet. App. 47a. As stated in *NCCB* and other decisions of this Court, deference to the FCC's licensing policies arises from the bedrock principle that access to radio frequencies, "unlike other modes of expression, * * * is subject to governmental regulation" because there is a "fixed natural limitation upon the number of stations that can operate without interfering with one another." *NBC*, 319 U.S. at 213, 226. See *NCCB*, 436 U.S. at 799 ("[B]ecause of problems of interference between broadcast signals," only "a finite number of frequencies"—"far exceeded by the number of persons wishing to broadcast"—"can be used productively."); see also *Turner Broad. Sys.* v. *FCC*, 512 U.S. 622, 637 (1994) ("The justification for our distinct approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium."). In the Communications Act, Congress addressed those physical limits by exercising federal "control * * * over all the channels of radio transmission," 47 U.S.C. 301, and vesting in the FCC the responsibility for ensuring that access to broadcast spectrum is provided only in accordance with the "public interest." 47 U.S.C. 301, 309(a), 310(d); see also *NBC*, 319 U.S. at 214-215, 226.

As this Court has consistently held, the FCC's lawful exercise of its licensing authority does not violate the constitutional rights of those who are denied broadcast licenses, because the "right of free speech does not include * * * the right to use the facilities of radio without a license." *NBC*, 319 U.S. at 226-227; see *NCCB*, 436 U.S. at 799. Although there are today more broadcast and non-broadcast outlets than there were when the *NCCB* decision was rendered, it remains the case that "many more people would like access to [spectrum] than can be accommodated." Pet. App. 47a; see *Turner*, 512 U.S. at 637 (noting that there are "more would-be broadcasters than frequencies available in the electro-

magnetic spectrum"). The core reason for deferential review of the Commission's licensing policies therefore continues in force.[9]

Of course, as the Commission has found, the modern growth in media outlets is relevant to setting an appropriate limitation on common ownership as a matter of communications policy. For instance, the Commission concluded in this case that the presence of numerous competing media outlets in most markets warranted relaxation of the prior "blanket prophylactic ban on newspaper-broadcast combinations," Pet. App. 432a (Order ¶ 330); see also *id.* at 461a-464a (Order ¶¶ 365-367), and the court of appeals agreed in principle, see Pet. App. 40a-44a. The Commission's new cross-media rule takes account of those marketplace changes by permitting newspaper-broadcast combinations in markets with four or more television stations—markets in which 97% of the U.S. population reside—and eliminating cross-ownership restrictions entirely in large media markets (including the Tampa Bay market highlighted by Media General, see 04-1020 Pet. 5-6). The FCC's decision to ease ownership restrictions, however, does not suggest that deferential judicial review of those restrictions is no longer required.

2. Instead of grappling with this Court's controlling decisions in *NCCB* and *NBC*, petitioners focus their attack on the Court's

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[9] Contrary to Media General's contention (04-1020 Pet. 12-13), this Court's settled analysis of broadcast regulation is entirely consistent with the Court's determination in *Turner* and *Reno* v. *ACLU*, 521 U.S. 844 (1997), not to apply the mode of analysis employed in *NBC* and *NCCB* to regulation of cable television and the Internet. As the Court explained, those other media do not present the same physical scarcity and interference concerns that necessitate governmental licensing of broadcast spectrum. See *Turner*, 512 U.S. at 639 ("given the rapid advances in fiber optics and digital compression technology," cable does not suffer from broadcasting's "inherent limitations," "[n]or is there any danger of physical interference between two cable speakers attempting to share the same channel."); *Reno*, 521 U.S. at 870 (noting that the Internet "can hardly be considered a 'scarce' expressive commodity" because "[i]t provides relatively unlimited, low-cost capacity for communications of all kinds.").

decision in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969). In *Red Lion*, this Court considered whether the FCC's former "fairness doctrine," which required broadcasters to "give adequate coverage to public issues" that "accurately reflects * * * opposing views," violated broadcasters' First Amendment rights. *Id.* at 377. The Court recognized that the fairness doctrine imposed on broadcasters a duty to air views and opinions with which they may not have agreed. *Id.* at 392 (noting that the fairness doctrine prevented broadcasters from "communicat[ing] only their own views on public issues" and "permit[ting] on the air only those with whom they agreed."). The Court concluded, however, that "licensees given the privilege of using scarce radio frequencies" may be required "to share [their] frequenc[ies] with others" and to act as "prox[ies] or fiduciar[ies] with obligations to present those views and voices which are representative of [their] communit[ies]." *Id.* at 389, 394. *Red Lion* remains good law. See, *e.g.*, *McConnell* v. *FEC*, 540 U.S. 93, 237, 241 (2003) (citing *Red Lion*).

Petitioners contend that the FCC's own determination in 1987 that the scarcity of broadcast frequencies no longer justified retention of the fairness doctrine, see *In re Syracuse Peace Council*, 2 F.C.C.R. 5043 (1987), aff'd, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990), calls into question the deferential review that courts have traditionally accorded the FCC's broadcast ownership rules. 04-1020 Pet. 19-20; 04-1036 Pet. 16-17; 04-1045 Pet. 26-27 n.17. There is no basis for that view. In repealing its fairness doctrine, the Commission determined that, in light of the development of new media outlets, spectrum scarcity in itself no longer justified the "intrusive type of content-based regulation" that the fairness doctrine imposed on broadcasters' editorial discretion. *Syracuse Peace Council*, 2 F.C.C.R. at 5054 ¶ 76; see *id.* at 5054 ¶ 72, 5068 nn.201-202. The Commission stressed, however, that "technological advancements * * * have not eliminated spectrum scarcity," *id.* at 5055 ¶ 78, and that its

analysis of the constitutionality of the fairness doctrine had no "relevance to the Commission's allocational and licensing function." *Id.* at 5069 n.204. Insofar as any doubt remained, the Commission later "ma[d]e clear that the dicta in *Syracuse Peace Council* regarding the appropriate level of First Amendment scrutiny has been rejected by Congress, this Commission, and the courts." *Repeal or Modification of the Personal Attack and Political Editorial Rules*, 15 F.C.C.R. 19,973, 19,979 ¶ 17 (2000); see *Radio-Television News Dirs. Ass'n* v. *FCC*, 229 F.3d 269 (D.C. Cir. 2000) (related reference). *Syracuse Peace Council* thus provides no support for petitioners' position. The physical limitations of the broadcast airwaves continue to justify the Communications Act's system for "allocat[ing] broadcast licenses in the 'public interest.'" *NCCB*, 436 U.S. at 795.[10]

Equally unconvincing is petitioners' contention that Congress has sent a "signal" that the FCC's ownership regulations should be subject to a higher level of scrutiny under the First Amendment. See 04-1036 Pet. 16 (quoting *League of Women Voters*, 468 U.S. at 376 n.11); 04-1045 Pet. 26-27 n.17. Congress has not in

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[10] Contrary to Tribune's contention (04-1036 Pet. 15), the Commission's determination that relaxation of the prior newspaper-broadcast cross-ownership prohibition (and its proposed elimination in larger markets) can produce public interest benefits in terms of local news coverage does not affect the constitutional analysis of continued cross-media limits in small- and mid-sized markets. *NCCB* recognized that, in giving effect to the public interest, the Commission must balance the goal of promoting diversity of ownership with the "sometimes conflicting" public interest goal of ensuring "the best practicable service to the public." 436 U.S. at 782 (quoting *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 394 (1965)). The Communications Act does not require the Commission to give either policy "controlling weight in all circumstances," but leaves that "weighing of policies" under the public interest standard to the Commission's judgment "in the first instance." *Id.* at 810. In this case, the Commission balanced the public interest benefits from broadcaster/newspaper combinations against the significant increases in concentration that can result from such combinations in small to medium size markets. Pet. App. 528a-533a (Order ¶¶ 462-471).

relevant respects amended or repealed the provisions of the Communications Act that confer on the Commission the authority to regulate the distribution of broadcast licenses in the public interest (see pp. 2-3, *supra*), nor has it enacted any statute that directs reviewing courts to apply heightened scrutiny to the FCC's ownership regulations. Petitioners' suggestion of a congressional "signal" is particularly weak with respect to rules restricting cross-ownership of newspapers and broadcast stations: Between 1988 and 1996, Congress prohibited the FCC from making any changes to the former newspaper-broadcast cross-ownership prohibition,[11] and, notwithstanding the fact that Congress in the 1996 Act directed the FCC to modify or reevaluate several of its then-existing media ownership rules, it did not mention that prohibition at all.

3. There is no basis for Media General's argument (04-1020 Pet. 26-30) that, notwithstanding this Court's holding in *NCCB* that newspaper/television cross-ownership regulations "are not content related," 436 U.S. at 801, the broadcast ownership rules should be subject to heightened scrutiny as content-based restrictions on speech. The "principal inquiry in determining content

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[11] See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, 102 Stat. 2216-2217; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 1020-1021; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1991, Pub. L. No. 101-515, 104 Stat. 2136; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-140, 105 Stat. 797; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-395, 106 Stat. 1846; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-121, 107 Stat. 1166-1167; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies 1995 Appropriations and 1994 Supplemental Appropriations Act, 1995, Pub. L. No. 103-317, 108 Stat. 1738.

neutrality * * * is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989); cf. *Turner*, 512 U.S. at 643 ("[L]aws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral."). This Court and lower courts have consistently and correctly regarded the FCC's broadcast ownership regulations as content-neutral, because the regulations do not turn on—and the FCC in applying the regulations does not examine—the content of any message an applicant for a broadcast license may seek to convey. *NCCB*, 436 U.S. at 801; *Fox*, 280 F.3d at 1046 (ownership regulations are "structur[al]," not "content-based"); see *NBC*, 319 U.S. at 226.

B. The Cross-Media Rule Does Not Violate The Due Process or Equal Protection Principles of the Fifth Amendment

Petitioners contend (04-1020 Pet. 23-25; 04-1036 Pet. 19-24) that the cross-media rule violates due process and equal protection principles because it limits cross-media combinations among daily newspapers, television stations, and radio stations, but not cable systems, Internet websites, and other information-delivery technologies. It is well established, however, that "the fact that a law singles out a certain medium" for different treatment does not by itself establish a constitutional concern. *Turner*, 512 U.S. at 660 (citing *Leathers* v. *Medlock*, 499 U.S. 439 (1991)). Such distinctions are permitted where "'justified by some special characteristic of' the particular medium being regulated." *Turner*, 512 U.S. at 660-661 (quoting *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Rev.*, 460 U.S. 575, 585 (1983)).

Because daily newspapers, television stations, and radio stations are the "three media platforms that Americans turn to most often for local news and information," Pet. App. 520a (Order ¶ 452), the public interest goal of promoting diversity of ownership and viewpoint is more affected by consolidation among

broadcast stations and newspapers than by combinations involving other types of media. Focusing the cross-media rule on those media protects diversity while avoiding unnecessary regulation of other industries. Cf. *Turner*, 512 U.S. at 661 (given that non-cable video delivery systems do not present the "bottleneck" control or threat to the survival of broadcast television stations posed by cable systems, "[i]t should come as no surprise * * * that Congress decided to impose the must-carry obligation upon cable operators only").

There is no basis for Tribune's assertion (04-1036 Pet. 22-23) that the Third Circuit's equal protection holding conflicts with decisions of other courts of appeals. The Fourth and Ninth Circuit decisions that Tribune cites were both vacated by this Court, see 516 U.S. 415, 1155-1156 (1996), and, in any event, both of those circuits agreed with the Third Circuit's conclusion below that *NCCB* controlled the constitutional analysis of newspaper-broadcast cross-ownership restrictions. See *Chesapeake & Potomac Tel. Co.* v. *United States*, 42 F.3d 181, 191-192 (4th Cir. 1994); *U.S. West* v. *United States*, 48 F.3d 1092, 1098 (9th Cir. 1994). In *News American Pub'g, Inc.* v. *FCC*, 844 F.2d 800, 812 (D.C. Cir. 1988), it was critical to the court's analysis that the challenged prohibition was "structural only in form, as it applies to a closed class of one publisher broadcaster."

Petitioners' contention (04-1020 Pet. 24; 04-1036 Pet. 20-21) that the FCC was constitutionally required to apply the cross-media rule to cable systems and Internet websites ignores the particular characteristics of those media and the limitations of the record before the Commission. As the Commission explained below, its analysis of diversity focused on likely sources of *local* news and public affairs programming. Pet. App. 489a-490a (Order ¶ 406). The Commission did not treat cable systems or networks as a significant contributor to viewpoint diversity, because there was insufficient reliable record evidence on the extent to which consumers rely on cable television for such programming.

Id. at 494a-495a (Order ¶ 414). See *NCCB*, 436 U.S. at 815 (upholding divestiture of newspaper-broadcast combinations in small markets on the basis that other forms of media did not make similar contributions to viewpoint diversity in local markets). With respect to the Internet, it would have made little sense to apply the cross-media rule to that medium; although the Commission originally concluded (in findings set aside below) that the Internet contributes to diversity in local markets, the Internet is not itself "owned"—or otherwise controlled—by any single party, and the multiplicity of Internet outlets would make it virtually impossible to develop a meaningful or workable cross-ownership rule in that context.

III. SECTION 202(h) DOES NOT IMPAIR THE COMMISSION'S AUTHORITY TO ADOPT AND REVISE ITS OWNERSHIP RULES

1. The Third Circuit correctly rejected NAB's argument (see 04-1033 Pet. 19-25) that the FCC's decision to revise the definition of radio markets and to count Joint Sales Agreements as broadcast interests violated the 1996 Act because those changes had the effect of making the local radio ownership rule more restrictive. Pet. App. 34a; see *id.* at 124a n.98 (Scirica, J., dissenting). The FCC's broad powers under the Communications Act to advance the public interest have traditionally included the power to impose additional restrictions on media ownership. See *NCCB*, 436 U.S. at 780-781. As the court of appeals correctly observed, "Congress gave no express indication [in the 1996 Act] that it intended to restrict the Commission's rulemaking authority" to adopt such restrictions where supported by the agency record. Pet. App. 34a n.18 (citing *American Hosp. Ass'n* v. *NLRB*, 499 U.S. 606, 613 (1991) ("[I]f Congress had intended to curtail in a particular area the broad rulemaking authority [it has] granted[,] * * * we would have expected it to do so in language expressly describing an exception [to that authority]."); see *id.* at 124a (Scirica, C.J.,

dissenting) (stating that the 1996 Act "does not foreclose the possibility of increased regulation under the biennial review if the Commission finds such action in the public interest").

Contrary to the contentions of NAB and Clear Channel (04-1033 Pet. 20-21; Clear Channel Br. 21), Congress's decision to set the permissible levels of common ownership in Section 202(a) of the 1996 Act does not constrain the FCC's authority to regulate broadcast ownership in the public interest. See Pet. App. 34a. Indeed, Section 202(h) of the same statute expressly directs the FCC to determine whether to "repeal *or modify*" ownership rules that may no longer promote the public interest. 110 Stat. 112 (emphasis added). As the court of appeals recognized (Pet. App. 34a), Congress's use of the term "modify," in conjunction with the continued emphasis on the "public interest" in Section 202(h), refutes the argument that Congress intended through Section 202(a) to effectuate a drastic reduction in the scope of the FCC's traditional licensing authority. Rather, the 1996 Act's congressionally specified revisions to the Commission's rules—including those to the radio ownership rules—"determined only the starting point from which the Commission was to assess the need for further change." *Fox*, 280 F.3d at 1043.

2. Contrary to petitioners' suggestion (04-1033 Pet. 24, 29; 04-1036 Pet. 25; 04-1045 Pet. 19-20; see Clear Channel Br. 24-26), the Third Circuit's interpretation of Section 202(h) in this case does not conflict with the D.C. Circuit's decisions in *Fox* and *Sinclair*. In *Fox*, the D.C. Circuit interpreted Section 202(h) to require the Commission, if it decides to retain a particular ownership rule, to provide an adequate explanation for its decision. See 280 F.3d at 1042, 1044. Likewise, the court in *Sinclair* concluded that the Commission "has wide discretion to determine where to draw administrative lines," 284 F.3d at 162 (internal quotation marks omitted), but that the Commission must "provide a reasoned explanation for its action," *ibid.* In stating that the Commission's decision to retain, modify, or repeal an ownership rule must

be supported by a "reasoned analysis," the Third Circuit articulated essentially the same standard in this case. See Pet. App. 34a-36a. And as the Third Circuit recognized, the D.C. Circuit has now made clear that Congress's direction that the Commission retain only those rules that are "necessary in the public interest" means only that a retained rule must be useful in serving the public interest. Pet. App. 30a-33a (discussing *Cellco P'ship* v. *FCC*, 357 F.3d 88, 98 (D.C. Cir. 2004)).[12]

IV. THE CONDITIONAL CROSS-PETITION IN NO. 04-1177 SHOULD BE DENIED

For the most part, Sinclair's cross-petition in No. 04-1177 reiterates arguments that are presented in the petitions filed in Nos. 04-1033, 04-1036, and 04-1045.[13] Although none of those arguments merits this Court's review, if the Court decides to address them, it may do so by granting one or more of the petitions in this case. There is no reason—and Sinclair offers none—why the Court should also grant a duplicative conditional cross-

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[12] Tribune's suggestion (04-1036 Pet. 25) that Section 202(h) eliminated the Third Circuit's authority to stay the revised rules is without merit. A court retains the authority to grant or withhold equitable remedies "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity." *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 313 (1982) (quoting *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946)). Section 202(h) does not contain any such restriction on the equitable authority of the courts.

[13] There is no basis for Sinclair's contention (04-1177 Cross-Pet. 9) that the Third Circuit's decision in this case "overrule[s]" the D.C. Circuit's decision in *Sinclair*. The *Sinclair* court concluded that the FCC had not provided an adequate explanation for limiting "voices" under the local television rule to television broadcasters. The Third Circuit below reviewed a different version of the local television rule in which the number of voices is no longer a factor and, therefore, did not consider the types of media that should count as "voices" under that rule.

petition that does not substantively add to the petitions already before the Court.

Nor should the Court entertain Sinclair's argument (04-1177 Cross-Pet. 14-16) that the local television ownership rule unconstitutionally "singles out" television broadcasters—an argument that is not otherwise presented in the petitions before the Court. The question whether television broadcasters have been singled out in violation of the First Amendment was not presented to the court of appeals by any party. Consequently, there is no decision of the court of appeals on that issue for this Court to review. See *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (citations omitted).

Sinclair's argument that the local television ownership rule violates the First Amendment is in any event without merit. A regulation may "single[] out a certain medium" without violating the First Amendment if the regulation is "justified by some special characteristic of the particular medium being regulated." *Turner*, 512 U.S. at 660-661 (internal quotation marks omitted). Although, as Sinclair notes (04-1177 Cross-Pet. 15), the FCC concluded that viewers generally consider television broadcasting and cable networks to be "good alternatives for one another" in the market for delivered video programming (Pet. App. 298a-299a (Order ¶ 143)), it also found that, because cable networks typically offer programming on a nationwide basis, they "may respond differently [from television stations] to changes in local market concentration." *Id.* at 299a (Order ¶ 145). The FCC thus reasonably concluded that it should "focus on ownership of television broadcast stations, not cable networks, to promote competition in local television markets." *Id.* at 300a.

CONCLUSION

The petitions and cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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Nos. 04-1020, 04-1033, 04-1036, 04-1045, 04-1168, and 04-1177

In the Supreme Court of the United States

MEDIA GENERAL, INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *Respondents*

ON PETITIONS AND CROSS-PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether this Court should overrule its long-settled holdings in *Red Lion Broadcasting v. FCC* and *FCC v. National Citizens Committee for Broadcasting* that broadcast regulations receive rational basis review under the First Amendment, that newspaper-broadcast cross-ownership regulations do not impermissibly discriminate in violation of the First or Fifth Amendment, and that newspaper-broadcast cross-ownership regulations are content-neutral.

2. Whether the court of appeals' interpretation of §202(h) of the 1996 Telecommunications Act accords with the decisions of the only other court of appeals to have considered the issue.

3. Whether the court of appeals properly remanded for justification or modification certain aspects of the Federal Communications Commission's 2002 Biennial Regulatory Review Order that were not supported by the record or that lacked reasoned analysis.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Public Interest Respondents state as follows:

Prometheus Radio Project, Fairness and Accuracy in Reporting, Center for Digital Democracy, Media Alliance, Office of Communication of the United Church of Christ, Inc., Consumer Federation of America, Consumers Union, American Hispanic Owned Radio Association, Civil Rights Forum on Communications Policy, League of United Latin American Citizens, Minority Business Enterprise Legal Defense and Education Fund, Minority Media and Telecommunications Council, National Asian American Telecommunications Association, National Association of Latino Independent Producers, National Coalition of Hispanic Organizations, National Council of La Raza, National Hispanic Media Coalition, National Indian Telecommunications Institute, National Urban League, Native American Public Telecommunications, Inc., PRLDEF—Institute for Puerto Rican Policy, Unity: Journalists of Color, Inc., Women's Institute for Freedom of the Press, and National Council of the Churches of Christ in the United States have no parent companies or publicly-issued stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
CORPORATE DISCLOSURE STATEMENT ii
TABLE OF AUTHORITIES v
STATEMENT 1
REASONS TO DENY THE WRIT 2
I. PETITIONERS HAVE NOT DEMONSTRATED ANY COMPELLING REASON TO OVERRULE LONGSTANDING PRECEDENT 3
A. Petitioners Have Presented No Compelling Reason to Revisit *NCCB*'s Holding That Rational Basis Is The Appropriate Standard For Review Of Broadcast Regulations 4
1. Neither Congress Nor The FCC Have Signaled That This Court Should Reconsider Its Approach To Broadcast Regulation 4
2. Spectrum Scarcity Continues To Exist As A Matter Of Fact 8
3. There Is No Conflict Among The Circuits Regarding The Scarcity Doctrine 9
B. Petitioners Have Presented No Compelling Reason To Revisit *NCCB*'s Equal Protection Holding 11
C. The Court Below Did Not Address Whether Cross-Ownership Regulations Are Content-Based; Nor Have Petitioners Presented Compelling Reason To Revisit *NCCB*'s Holding That Such Regulations Are Content-Neutral 15

D. Should The Court Wish to Reconsider Its Constitutional Precedent, Other Cases Offer A Better Opportunity For Fully Assessing The Issues 16

II. THERE IS NO CONFLICT OVER THE INTERPRETATION OF §202(h) OF THE 1996 TELECOMMUNICATIONS ACT 17

III. ROUTINE APPLICATION OF WELL-SETTLED ADMINISTRATIVE LAW STANDARDS DOES NOT MERIT THIS COURT'S INTERVENTION.. 21

CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995) 10

Adventure Communications, Inc. v. Kentucky Registry of Election Fin., 191 F.3d 429 (4th Cir. 1999) 10

American Family Ass'n, Inc. v. FCC, 365 F.3d 1156 (D.C. Cir. 2004) 8, 10, 11, 15, 16

Beach Television Partners, In re, 38 F.3d 535 (11th Cir. 1994) 10

Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968) 10

Bunting v. Mellen, 541 U.S. 1019, 124 S.Ct. 1750 (2004) ... 10

Cellco P'ship v. FCC, 357 F.3d 88 (D.C. Cir. 2004) 18, 19, 20

Chesapeake & Potomac Tel. Co. v. United States, 42 F.3d 181 (4th Cir. 1994), *vacated*, 516 U.S. 415 (1996) (per curiam) 14

Chicago Cable Communications v. Chicago Cable Comm'n, 879 F.2d 1540 (7th Cir. 1989) 10

Cmty. Communications Co., Inc. v. City of Boulder, Colo., 660 F.2d 1370 (10th Cir. 1981) 10

FCC v. League of Women Voters of California, 468 U.S. 364 (1984) 4, 5, 14

FCC v. National Citizens Comm. for Broad., 436 U.S. 775 (1978) ..... *passim*

Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, *modified on rehearing*, 293 F.3d 537 (D.C. Cir. 2002) 8, 14, 19, 20

Free Speech ex rel. Ruggiero v. Reno, 200 F.3d 63 (2d Cir. 1999) (per curiam) 9, 10

Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271 (1949) 24

Grid Radio v. FCC, 278 F.3d 1314 (D.C. Cir. 2002) 9

Grosjean v. American Press Co., 297 U.S. 233 (1936) 14

Mark v. FCC, 468 F.2d 266 (1st Cir. 1972) 10

McConnell v. Federal Election Comm'n, 540 U.S. 93 (2003) 4

Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983) 14

Missouri v. Jenkins, 515 U.S. 70 (1995) 24

Muir v. Alabama Educ. Television Comm'n, 688 F.2d 1033 (5th Cir. 1982) 10

Nat'l Broad. Co., Inc. v. United States, 319 U.S. 190 (1943) 4

Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459 (1999) 15

Prayze FM v. FCC, 214 F.3d 245 (2d Cir. 2000) 9

Radio-Television News Dir. Ass'n v. FCC, 184 F.3d 872 (D.C. Cir. 1999) 11

Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) ..... *passim*

Ruggiero v. FCC, 317 F.3d 239 (D.C. Cir. 2003) 9, 15

Scott v. Rosenberg, 702 F.2d 1263 (9th Cir. 1983) 10

Sinclair Broadcast Group, Inc. v. FCC, 284 F.3d 148 (D.C. Cir. 2002) 8, 19, 20, 24

State Oil v. Khan, 522 U.S. 3 (1997) 4

Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989) 10

Telecomm. Research & Action Ctr. v. FCC, 801 F.2d 501 (D.C. Cir. 1986) 11

Time Warner Entertainment Co. v. FCC, 105 F.3d 723 (D.C. Cir. 1997) 10

Time Warner Entertainment Co. v. United States, 211 F.3d 1313 (D.C. Cir. 2000) 16

Tribune Co. v. FCC, 133 F.3d 61 (D.C. Cir. 1988) 11

Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994) 13, 16

United States v. Any and All Radio Station Transmission Equip., 218 F.3d 543 (6th Cir. 2000) 9

United States v. Any and All Radio Station Transmission Equip., 207 F.3d 458 (8th Cir. 2000) 9

United States v. Dunifer, 219 F.3d 1004 (9th Cir. 2000) 9

United States v. Mead Corp., 533 U.S. 218 (2001) 18, 20

United States v. Szoka, 260 F.3d 516 (6th Cir. 2001) 10

US West, Inc. v. United States, 48 F.3d 1092 (9th Cir. 1994), *vacated*, 516 U.S. 1155 (1996) 14

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 15

Statutes

47 U.S.C. § 336 6

Balanced Budget Act, Pub. L. No. 105-33, 111 Stat. 251 (1997) 6

Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996 (1990) 5, 6

Consolidated Appropriations Act, Pub. L. No. 108-199, 118 Stat. 3 (2004) 7

Department of Commerce and Related Agencies Appropriations of 2001, H.R. 5548, *enacted by* H.R. 4942, Pub. L. No. 106-553, 114 Stat. 2762 (2000) 7

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) 6, 18

§ 11 ..... 19, 20

§ 201(a) 6

§ 202(b) 20
§ 202(h) 18, 19, 20, 21

Legislative Authorities

H.R. Rep. No. 101-385 6
H.R. Rep. No. 105-149 ..... 6, 7

Administrative Authorities

2002 Biennial Regulatory Review, Report & Order and Notice of Proposed Rulemaking, 18 F.C.C.R. 13620 (2003) ..... *passim*

Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report & Order, 50 F.C.C.2d 1046 (1975), *vacated in part, KCMC, Inc. v. FCC*, 600 F.2d 546 (5th Cir. 1979) 11, 12

Miscellaneous

Application for Renewal of Broadcast Station License for WBTW, FCC File No. BRCT-20040802BIK (Aug. 6, 2004) 17

Media General Opposition to Petition to Deny (Dec. 14, 2004) 17

Application for Renewal of Broadcast Station License for WMBB, FCC File No. BRCT-20041001AQF (Oct. 7, 2004) 17

Application for Renewal of Broadcast Station License for WRBL, FCC File No. BRCT-20041210BZP (Dec. 8, 2004) 17

Karl M. Manheim & Lawrence B. Solum, *An Economic Analysis of Domain Name Policy*, 25 Hastings Comm. & Ent. L.J. 359, 439 (2003) 6, 7

News Release, FCC Announces Close to Unprecedented FM Auction (Nov. 24, 2004) 7

Public Notice, Blanco, Texas Broadcast Auction No. 80 Closes (July 18, 2000) 7

Supreme Court Rule 10 ..... 3, 22

STATEMENT

Public Interest Respondents[1] generally adopt the statement of the United States in this case, and write separately to underscore two additional points.

1. The court of appeals upheld much of the FCC's 2002 Biennial Regulatory Review Order ("*2002 Biennial*"). Pet. App. 1a-190a.[2] The court's comprehensive opinion properly notes that the scope of judicial review of federal agency action is "narrow" and that it is only authorized to remand an agency decision when "it is not supported by substantial evidence, or the agency has made a clear error in judgment." *Id.* at 25a (internal citations omitted). For example, the court upheld the FCC's decisions to relax its cross-ownership ban, *id.* at 40a, to retain the "top four" restriction on ownership of local television stations, *id.* at 72a, to revise its definition of local radio markets, *id.* at 85a, and to count "joint sales agreements" toward a radio station's permissible ownership total, *id.* at 96a.

2. The court of appeals was unanimous in its disposition of many key arguments raised by Petitioners and Cross-

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[1] Public Interest Respondents are Prometheus Radio Project, Fairness and Accuracy in Reporting, Center for Digital Democracy, Media Alliance, Office of Communication of the United Church of Christ, Inc., Consumer Federation of America, Consumers Union, American Hispanic Owned Radio Association, Civil Rights Forum on Communications Policy, League of United Latin American Citizens, Minority Business Enterprise Legal Defense and Education Fund, Minority Media and Telecommunications Council, National Asian American Telecommunications Association, National Association of Latino Independent Producers, National Coalition of Hispanic Organizations, National Council of La Raza, National Hispanic Media Coalition, National Indian Telecommunications Institute, National Urban League, Native American Public Telecommunications, Inc., PRLDEF—Institute for Puerto Rican Policy, Unity: Journalists of Color, Inc., Women's Institute for Freedom of the Press, and the National Council of the Churches of Christ in the United States.

[2] References are to the appendix filed by Petitioner in 04-1020.

Petitioners. The court unanimously rejected all of the constitutional challenges raised by Petitioners. *See* Pet. App. 107a. Chief Judge Scirica agreed with the majority on the proper legal standards for review of agency decisions, *compare id.* at 24a-26a, *with id.* at 116a-118a, but came to a different conclusion as to the application of those standards to certain specific rules.

REASONS TO DENY THE WRIT

Review by this Court would be premature. The court of appeals neither forbade nor compelled the implementation of specific rules; it simply remanded those rules that were without factual record support or rational agency explanation. Because many rules challenged by Petitioners are not expected to be retained on remand, review of those rules would likely be unnecessary. Further, all of the rules at issue in this case may be modified or repealed by the FCC during the next congressionally-mandated review of media ownership rules, which the FCC will conduct in 2006. This Court should not expend its scarce judicial resources to pass on specific rules that may be repealed or modified by the time its decision is issued.

More importantly, despite the voluminous record below, the proceeding did not focus on the core issue raised by many Petitioners—whether spectrum scarcity continues to exist. Accordingly, even assuming this Court should wish to revisit this fact-dependent question, this case would be a poor vehicle through which to do so.

Nor does this case present any broad, unsettled issues of law for this Court to review. The court below did not announce any new principle of constitutional law; it simply applied doctrine that has been clearly established by this Court. Petitioners present no valid reason for this Court to overrule this precedent. Further, the Third Circuit's interpretation of the relevant statute's standard of review provision is in com-

plete harmony with the explanation of the only other court of appeals to have considered it.

Stripped of its constitutional and statutory rhetoric, this case is simply about the application of properly articulated administrative law principles to a complex factual record. Such case-specific issues do not warrant this Court's intervention. Sup. Ct. R. 10.

I. PETITIONERS HAVE NOT DEMONSTRATED ANY COMPELLING REASON TO OVERRULE LONGSTANDING PRECEDENT

The appropriate standard of review for assessing the constitutionality of the FCC's broadcast ownership rules was decided by this Court in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) ("*NCCB*"). The court of appeals properly applied the standards established in *NCCB* to this case. Essentially conceding this point, three Petitioners nonetheless urge this Court to reconsider and overrule *NCCB*.

In *NCCB*, newspaper and broadcast station owners challenged the FCC's then recently adopted newspaper-broadcast cross-ownership rule, which was much more restrictive than the rules at issue in this case. The Court rejected the argument that the cross-ownership rule violated the First Amendment, finding that the argument "ignore[d] the fundamental proposition that there is no 'unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.'" 436 U.S. at 799 (citing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388 (1969)). The Court observed that the "physical limitations of the broadcast spectrum are well known" and that the number of frequencies used for broadcasting "is far exceeded by the number of persons wishing to broadcast to the public." 436 U.S. at 799.

This Court has repeatedly emphasized that the reconsideration of previous decisions should be approached with the utmost caution. *See, e.g.*, *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). Indeed, just last term, this Court explicitly relied on *Red Lion* in upholding an important provision of the Bipartisan Campaign Reform Act of 2002. *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 237 (2003). Because, as shown below, Petitioners present no compelling reason for this Court to reconsider its prior decisions, the Court should deny certiorari.

A. Petitioners Have Presented No Compelling Reason To Revisit *NCCB*'s Holding That Rational Basis Is The Appropriate Standard For Review Of Broadcast Regulations

As far back as 1943, this Court rejected a constitutional challenge brought by the broadcast networks against an FCC ownership rule known as the "chain broadcasting rule." The Court recognized that "[u]nlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation." *Nat'l Broad. Co., Inc. v. United States*, 319 U.S. 190, 226 (1943). Subsequently, in *Red Lion*, the Court explained that "in view of the limited number of available broadcasting frequencies," it did not violate the First Amendment for the FCC to require broadcasters to serve the public interest by providing certain types of programming. 395 U.S. at 394 (internal quotations omitted).

1. Neither Congress Nor The FCC Have Signaled That This Court Should Reconsider Its Approach to Broadcast Regulation

In *FCC v. League of Women Voters of California*, the Court concluded that "[w]e are not prepared . . . to reconsider our longstanding approach [of *Red Lion*] without some signal

from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." 468 U.S. 364, 376 n.11 (1984). This signal has not been given.

a. In this very proceeding, the FCC reaffirmed its support for the scarcity doctrine. Responding to arguments made by two of the present Petitioners, the FCC stated:

> We disagree with Media General and Tribune, who argue that our ownership rules affecting newspapers should be judged under strict scrutiny First Amendment analysis. Media General and Tribune claim that spectrum scarcity is no longer a valid rationale for media ownership limits . . . . [T]he courts have considered and consistently rejected the arguments for a stricter standard of First Amendment scrutiny of broadcast regulation made by commenters here. Accordingly, the rational basis test continues to apply to our ownership rules.

Pet. App. 218a (*2002 Biennial* ¶15). As this makes evident, the FCC is clearly not "signaling" this Court to reconsider the scarcity doctrine.

b. Nor has Congress indicated a desire for the Court to reconsider the scarcity doctrine. To the contrary, Congress has enacted numerous laws imposing public interest requirements premised on the continued existence of scarcity, and in some cases, reinforcing that scarcity.

For example, in the Children's Television Act of 1990, Congress explicitly found that as part of television stations' obligations to serve the public interest, stations should provide programming serving the special needs of children. Congress therefore directed the FCC to consider in renewing television licenses the extent to which the licensee has served the educational and informational needs of children. Chil-

dren's Television Act of 1990, Pub. L. No. 101-437, §§ 101(2), 103(a), 104 Stat. 996, *codified in part at* 47 U.S.C. § 303(a). *See also* H.R. Rep. No. 101-385 at 8 (citing *Red Lion* and rejecting suggestions of constitutional difficulties with Act).

In 1996, Congress added a new section to the Communications Act to establish a framework for the transition from analog to digital television. Telecommunications Act of 1996, Pub. L. No. 104-104, § 201(a), 110 Stat. 56 (1996), *codified at* 47 U.S.C. § 336 ("1996 Act"). Although this transition offered the opportunity for awarding additional broadcast licenses, Congress opted instead to limit eligibility for digital television licenses to the existing licensees. 47 U.S.C. § 336(a)(1). At the same time, Congress reaffirmed that television licensees were expected to continue to meet their obligation to serve the public interest. *Id.* at § 336(d). Thus, if anything, the 1996 Act actually increased scarcity by declining to make this spectrum available to new licensees.[3]

In 1997, Congress directed that the FCC utilize auctions to award all new commercial broadcast licenses, shifting away from a "comparative hearing" process whereby the FCC evaluated each applicant before awarding a license. Balanced Budget Act, Pub. L. No. 105-33, § 3301, 111 Stat. 251 (1997). This action was intended to address the inefficiencies of the hearing process that stemmed from the growing number of applications for new broadcast licenses. H.R. Rep. No. 105-149 at 558; *see also* Karl M. Manheim & Lawrence B. Solum, *An Economic Analysis of Domain Name Policy*, 25 Hastings Comm. & Ent. L.J. 359, 439 (2003). In-

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[3] Tribune claims that Congress' requirement that the FCC redistribute spectrum after the digital television transition is complete demonstrates that it no longer believes the spectrum is scarce. 04-1036 Pet. 17. In fact, this leads to the opposite conclusion—if there were not more would-be users than available frequencies, Congress would have no reason to re-apportion the spectrum.

deed, the Balanced Budget Act relied upon spectrum scarcity in requiring that minimum amounts be raised by each auction. H.R. Rep. No. 105-149 at 569-72 (setting minimum amounts "[i]n recognition of the scarcity (and hence, the value) of spectrum"). Both the use of auctions and the high prices they generate[4] demonstrate that there continue to be far more would-be broadcasters than can be accommodated by the broadcast spectrum.

In 2000, Congress actually rolled back an FCC attempt to award additional broadcast licenses through the creation of a new, noncommercial low power FM radio service. A provision in the Department of Commerce and Related Agencies Appropriations Act of 2001 limited the number of low-power radio applications that the FCC could grant, due to concerns that allowing more radio stations on the air would interfere with existing broadcast stations. H.R. 5548 § 632, *enacted by* H.R. 4942, Pub. L. No. 106-553, 114 Stat. 2762 (2000).

And finally, in early 2004, Congress passed legislation rolling back the FCC's relaxation of the national television audience limits. Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3 (2004). As part of the *2002 Biennial*, the FCC increased the percentage of the national television audience that one company could "reach" from 35% to 45%. Congress overruled the FCC's decision

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[4] For example, the FCC's first ever open auction of the FM broadcast spectrum saw over 450 bidders participate, and resulted in 110 winning bidders paying nearly $150 million for a portion of the spectrum. News Release, FCC Announces Close to Unprecedented FM Auction (Nov. 24, 2004). The FCC noted that this auction "signifie[d] the continuing strong demand for radio broadcast spectrum." *Id.* In another example, eleven bidders vied for a single television station license in Blanco, TX; the winning bid approached $19 million. Public Notice, Blanco, Texas Broadcast Auction No. 80 Closes (July 18, 2000). One reason for the high prices generated by spectrum auctions is that "very few 'new' broadcast licenses are issued these days," a fact that is "the consequence of spectrum scarcity." Manheim & Solum, *supra*, at 441.

and rolled the cap back to 39%. If Congress did not believe that the spectrum was "scarce," it would have no reason to cap permissible ownership. As the D.C. Circuit explained, "[i]n the face of [the limited capacity of the spectrum], the national ownership cap increases the number of different voices heard in the nation . . . . But for the scarcity rationale, that increase would be of no moment." *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1046, *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002).

2. Spectrum Scarcity Continues To Exist As A Matter Of Fact

Various Petitioners nonetheless argue that this Court should reconsider *NCCB* and *Red Lion* because the factual predicate of the scarcity doctrine has been eroded by the development of cable television, direct broadcast satellites, and the internet. 04-1020 Pet. 10-11, 04-1036 Pet. 16, 04-1045 Pet. 26. But, as the court of appeals correctly recognized, "[t]he abundance of non-broadcast media does not render the broadcast spectrum any less scarce." Pet. App. 47a. Nor is there any conflict among the Circuits on this point. The D.C. Circuit recently rejected the same argument, noting that the "protest that *NCCB* [and the scarcity doctrine] is no longer controlling because it is undermined by the advent of cable television, DBS, and the internet, is to no avail." *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 168-69 (D.C. Cir. 2002) (internal quotations and citations omitted); *see also American Family Ass'n, Inc. v. FCC*, 365 F.3d 1156, 1169 (D.C. Cir. 2004) (noting that the number of frequencies that can be productively used "is far exceeded by the number of persons wishing to broadcast").

Further evidence that there continue to be more would-be broadcasters than frequencies available for licensing is demonstrated by the large number of unlicensed broadcast stations that have been shut down by the FCC in recent

years.[5] Likewise, Media General's contention (04-1020 Pet. 12-13) that the scarcity doctrine has been undermined because this Court has not extended the doctrine to cable or internet regulations misses the point. As the *Red Lion*'s scarcity doctrine is based on the unique physical characteristics of the broadcast spectrum, the fact that the doctrine has not been extended beyond the broadcast arena in no way undercuts its viability in the broadcast arena. Spectrum scarcity exists today in the same form that it did when this Court first recognized the doctrine more than a half-century ago.[6] Further review of this factual question, which was not addressed by the FCC or the court of appeals and barely raised in the huge administrative record, is unwarranted.

3. There Is No Conflict Among The Circuits Regarding The Scarcity Doctrine

Contrary to many Petitioners' contentions, there is no conflicting authority among the courts of appeals regarding the scarcity doctrine or the appropriate level of scrutiny for broadcast regulations. Every Circuit has recognized that broadcasting regulation is subject to more deferential review

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[5] *See, e.g., Ruggiero v. FCC*, 317 F.3d 239, 242 (D.C. Cir. 2003); *Grid Radio v. FCC*, 278 F.3d 1314, 1316 (D.C. Cir. 2002); *Prayze FM v. FCC*, 214 F.3d 245, 250 (2d Cir. 2000); *United States v. Any and All Radio Station Transmission Equip.*, 218 F.3d 543, 549-50 (6th Cir. 2000); *United States v. Any and All Radio Station Transmission Equip.*, 207 F.3d 458, 459 (8th Cir. 2000); *United States v. Dunifer*, 219 F.3d 1004, 1005 (9th Cir. 2000); *Free Speech ex rel. Ruggiero v. Reno*, 200 F.3d 63, 64 (2d Cir. 1999) (per curiam).

[6] Media General claims (04-1020 Pet. 22) that because modern technology has increased the amount of spectrum available for use, scarcity no longer exists. This is not the case. *Red Lion*'s observation that "[a]dvances in technology . . . have led to more efficient utilization of the frequency spectrum, but uses for the spectrum have also grown apace," 395 U.S. at 396-97, remains true today with the tremendous growth in cellular telephone service and other wireless services.

under the First Amendment due to the fact that more people wish to broadcast than the spectrum can accommodate.[7]

Tribune contends (04-1036 Pet. 13) that the Third Circuit's suggestion that it would endorse the scarcity doctrine "[e]ven were [it] not constrained by Supreme Court precedent," Pet. App. 47a, somehow creates a conflict with the D.C. Circuit. This is not so. While comments critical of the scarcity doctrine have sometimes appeared in dissenting or concurring opinions of the D.C. Circuit, *see, e.g.*, *Time Warner Entertainment Co. v. FCC*, 105 F.3d 723, 724 n.2 (D.C. Cir. 1997) (dissent from denial of rehearing en banc); *Action for Children's Television v. FCC*, 58 F.3d 654, 675 (D.C. Cir. 1995) ("*ACT*") (Edwards, C.J., dissenting); *Syracuse Peace Council v. FCC*, 867 F.2d 654, 682-83 (D.C. Cir. 1989) (Starr, J., concurring), such comments are dicta, and conflicts involving dicta do not merit certiorari. *See, e.g.*, *Bunting v. Mellen*, 541 U.S. 1019, 124 S.Ct. 1750, 1754 (2004). Recognizing that *Red Lion* continues to "rule the

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[7] For example, the D.C. Circuit recently reviewed the FCC's system for awarding non-commercial educational broadcast licenses and held that the scheme was subject to deferential review under the First Amendment. It concluded that "[r]egulation of some form is an irreducible feature of any broadcast spectrum worth having, since 'a finite number of frequencies can be used productively; this number is far exceeded by the number of persons wishing to broadcast to the public.'" *American Family Ass'n*, 365 F.3d at 1169 (quoting *NCCB*, 436 U.S. at 798). *See also Mark v. FCC*, 468 F.2d 266, 269 (1st Cir. 1972); *Free Speech ex rel. Ruggiero v. Reno*, 200 F.3d 63, 64 (2d Cir. 1999) (per curiam); *Adventure Communications, Inc. v. Kentucky Registry of Election Fin.*, 191 F.3d 429, 439-40 (4th Cir 1999); *Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1039, 1043 (5th Cir. 1982); *United States v. Szoka*, 260 F.3d 516, 526 (6th Cir. 2001); *Chicago Cable Communications v. Chicago Cable Comm'n*, 879 F.2d 1540, 1548 (7th Cir. 1989); *Black Hills Video Corp. v. FCC*, 399 F.2d 65, 69 (8th Cir. 1968); *Scott v. Rosenberg*, 702 F.2d 1263, 1272 (9th Cir.1983); *Cmty. Communications Co., Inc. v. City of Boulder, Colo.*, 660 F.2d 1370, 1376 n.5 (10th Cir. 1981); *In re Beach Television Partners*, 38 F.3d 535, 536 (11th Cir. 1994).

broadcast jungle," *Tribune Co. v. FCC*, 133 F.3d 61, 69 (D.C. Cir. 1988), the D.C. Circuit has consistently and properly applied the scarcity doctrine. *See, e.g.*, *American Family Ass'n*, 365 F.3d at 1168; *Radio-Television News Dir. Ass'n v. FCC*, 184 F.3d 872, 877 n.3 (D.C. Cir. 1999) ("*RTNDA*"); *Telecomm. Research & Action Ctr. v. FCC*, 801 F.2d 501, 509 (D.C. Cir. 1986) ("*TRAC*"). Thus there is simply no conflict for this Court to review.

B. Petitioners Have Presented No Compelling Reason To Revisit *NCCB*'s Equal Protection Holding

Certain Petitioners also challenge the court of appeals' decision that rules barring newspapers from owning broadcast stations do not impermissibly discriminate in violation of the First or Fifth Amendment. As with the scarcity doctrine, this Court has already addressed this issue. In *NCCB*, the Court upheld a ban on newspaper-broadcast cross-ownership against an equal protection challenge, finding the regulations to be a "reasonable means" of promoting the FCC's objectives. 436 U.S. at 801-02. Indeed, even Media General acknowledges (04-1020 Pet. 24) that the *NCCB* Court rejected the argument that the cross-ownership regulations unfairly single out newspaper owners.

1. Nonetheless, Media General and Tribune argue that this Court should reconsider *NCCB* because "in *NCCB's* day, the only other 'major media of mass communications' besides newspapers were broadcast television and radio," while today other forms of mass media such as cable and internet are available. 04-1020 Pet. 24; *see also* 04-1036 Pet. 20. This misreads *NCCB*. The cross-ownership rule at issue in *NCCB* was not intended to diversify all major media of mass communication; rather, the FCC sought to regulate media cross-ownership to promote diversity of viewpoints within local communities. 436 U.S. at 786 (citing *Rules Relating to Multiple Ownership of Standard, FM, and Television Broad-*

cast Stations, Second Report & Order, 50 F.C.C.2d 1046, 1075 (1975) ("*1975 Order*")). The FCC excluded certain types of mass media, such as magazines and other periodicals that "dealt exclusively with regional or national issues and ignored local issues." *1975 Order*, 50 F.C.C.2d at 1080 ¶112; *see also NCCB*, 436 U.S. at 787 n.10. Thus, in 1975, the FCC recognized that other major mass media existed, but chose to restrict common ownership of only those media that covered local issues—specifically newspapers, broadcast television, and broadcast radio.

Similarly, in the *2002 Biennial,* the FCC sought to "preserv[e] viewpoint diversity among local, not national, news sources." Pet. App. 484a-485a (*2002 Biennial* ¶399). Thus, the FCC excluded "the large number of *national* news sources such as all-news cable channels and the news sources on the Internet." *Id.* (emphasis added). Finding that "broadcast television, daily newspapers, and broadcast radio" continue to be "the three media platforms that Americans turn to most often for local news and information," *id.* at 520a (*2002 Biennial* ¶452), the FCC appropriately limited the cross-media limits to the media that are the most significant sources of local news.

Petitioners Newspaper Association of America, Belo Corp., Gannett Co., Inc., and Morris Communications Company, LLC ("NAA") (04-1045 Pet. 27), along with Media General (04-1020 Pet. 25), also claim that the specific cross-ownership regulations adopted in the *2002 Biennial* violate *NCCB*'s equal protection holding because they treat newspaper owners somewhat differently than radio and television station owners. Again, these Petitioners misread *NCCB*. *NCCB* merely required the cross-ownership regulations reviewed below to treat newspaper and broadcast owners "in *essentially* the same fashion." 436 U.S. at 801 (emphasis added). As with the rules at issue in *NCCB*, the cross-ownership regulations treat newspaper and broadcast owners

essentially the same way in that all are restricted in their ability to own another type of local media. *See* Pet. App. 452a. Moreover, contrary to Media General's absolute statement that "a cable company may buy a broadcast station even where a newspaper may not," 04-1020 Pet. 24, a newspaper owner may receive a waiver of the rule to co-own a broadcast station in certain circumstances. Pet. App. 437a (*2002 Biennial* ¶481).

2. The court of appeals' decision not to apply heightened scrutiny to the cross-ownership regulations does not conflict with any decision of this Court. The *NCCB* Court did not apply heightened scrutiny in its disposal of the equal protection challenges, but rather found that content-neutral regulations that prevent any person from owning both a newspaper and a broadcast station are a "*reasonable means* of promoting the public interest in diversified mass communications." 436 U.S. at 802 (emphasis added).

Moreover, *NCCB*'s use of rational basis review is fully consistent with this Court's recent jurisprudence. Tribune and Cross-Petitioner Sinclair Broadcast Group, Inc. ("Sinclair") rely (04-1036 Pet. 21-22, 04-1177 Pet. 15) on *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*") to argue that *any* regulation that distinguishes between classes of media outlets demands heightened scrutiny. However, this argument is directly precluded by *Turner I*'s admonition that "[i]t would be error to conclude . . . that the First Amendment mandates strict scrutiny for any speech regulation that applies to one medium (or a subset thereof) but not others." 512 U.S. at 660. *Turner I*'s touchstone for determining the level of scrutiny is the type of medium; "heightened scrutiny is unwarranted when the differential treatment is justified by some special characteristic of the particular medium being regulated." *Id.* at 660-61 (internal citations omitted). As the cross-ownership restrictions apply

to broadcast media, the "special characteristic" of spectrum scarcity makes heightened scrutiny unwarranted.

The other cases relied upon by Tribune (04-1036 Pet. 21-23; *see also* 04-1177 Cross-Pet. 15) are inapposite to the question of the proper standard of review of content-neutral broadcast regulations. *League of Women Voters* applied heightened scrutiny because the statute in question was a *content-based* speech restriction. 468 U.S. at 383.[8] *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), considered the constitutionality of a tax imposed only on newspapers, and is directly analogous to *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), which the *NCCB* Court held not to be controlling on the question of cross-ownership regulations, 436 U.S. at 801. Finally, the two court of appeals decisions cited by Tribune (04-1036 Pet. 22-23) concerned regulation of telephone companies, and both cases expressly recognized that broadcast ownership regulations receive a different and lower level of constitutional scrutiny.[9]

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[8] *See also Fox Television Stations*, 280 F.3d at 1046 (rejecting heightened scrutiny because the rule at issue, "unlike the [rule] at issue in *League of Women Voters*, is not a content-based regulation; it is a regulation of industry structure, like the newspaper/broadcast cross-ownership rule the Court concluded was content-neutral in *NCCB*").

[9] Further, both cases were vacated by this Court. *US West, Inc. v. United States*, 48 F.3d 1092, 1098 (9th Cir. 1994), *vacated*, 516 U.S. 1155 (1996); *Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181, 191 (4th Cir. 1994), *vacated*, 516 U.S. 415 (1996) (per curiam).

C. The Court Below Did Not Address Whether Cross-Ownership Regulations Are Content-Based; Nor Have Petitioners Presented Compelling Reason To Revisit *NCCB*'s Holding That Such Regulations Are Content-Neutral

Media General's and Tribune's contention (04-1020 Pet. 26; 04-1036 Pet. 23) that the cross-ownership regulations should have been subjected to heightened scrutiny because they are content-based restrictions on speech likewise provides no basis for reconsidering *NCCB*. As a threshold matter, review of this argument is inappropriate because it was not addressed in the decision below. This Court "do[es] not decide in the first instance issues not decided below." *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999).

Certiorari is also unnecessary because this Court has already addressed the question, specifically holding that newspaper-broadcast cross-ownership regulations "are not content related." *NCCB*, 436 U.S. at 801. Lower courts have properly followed that decision, recognizing that cross-ownership rules are simply structural regulations that receive minimal constitutional scrutiny. *See, e.g.*, *American Family Ass'n*, 365 F.3d at 1169; *Ruggiero*, 317 F.3d at 244.

In any event, the court of appeals' decision that the structural cross-ownership regulations are not content-based is correct. As this Court has explained, "[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The cross-ownership regulations were not at all motivated by the message of the speaker, but rather were developed to ensure a diversity of media voices was available to the public. Pet. App. 481a-482a (*2002 Biennial* ¶¶393-94). "[B]y placing a value upon diversity the FCC did not necessarily . . . value one speaker, or one type of speech over another; it merely

expressed its intention that there continue to be multiple speakers." *American Family Ass'n,* 365 F.3d at 1169 (internal quotations omitted).

The D.C. Circuit has held that analogous regulations of the structure of cable ownership that were motivated by diversity concerns were not content-based. In *Time Warner Entertainment Co. v. United States*, the court noted that "[a]s the Supreme Court made quite clear in *Turner I*, . . . making way for some speakers" in a context like broadcasting "where that necessarily means limiting the speech of others, is not inherently content-based." 211 F.3d 1313, 1317 (D.C. Cir. 2000). This same, traditional rationale clearly applies to the present regulations—rules restricting broadcast ownership to promote a diversity of media outlets are not subject to heightened First Amendment scrutiny.

D. Should The Court Wish To Reconsider Its Constitutional Precedent, Other Cases Offer A Better Opportunity For Fully Assessing The Issues

The *2002 Biennial* focused on specific ownership rules and not the factual underpinnings of the scarcity doctrine. Any reference to the continued existence of spectrum scarcity was an inconsequential piece of a massive record, and the factual basis for doctrine was not addressed on the merits by the FCC or the court of appeals. Re-examination of the scarcity doctrine would be a fact-intensive process. The present case plainly does not afford this Court a sufficient record or factual basis for such a task.

Moreover, as a practical matter, this case does not present an actual cross-ownership rule for constitutional review. Because the court below agreed with the FCC that the original newspaper-broadcast cross-ownership rule was no longer necessary, *see* Pet. App. 40a, there is no need to re-evaluate the constitutionality of that rule. On the other hand, since the court found that the replacement rule adopted by the FCC

was arbitrary and capricious and subject to further proceedings on remand, it would make no sense to evaluate the constitutionality of that rule at this time.

Further, the FCC has before it at least three licensing cases that squarely present the issue of whether the cross-ownership prohibition is constitutional. Specifically, Media General has filed license renewal applications asking the FCC to waive the newspaper-broadcast cross-ownership rule to allow it to continue to own both a daily newspaper and a television station in the Myrtle Beach-Florence, South Carolina, Panama City, Florida, and Columbus, Georgia DMAs.[10] In making its waiver requests, Media General argues that spectrum scarcity no longer exists and thus the cross-ownership rules are unconstitutional. *See, e.g.* Application for Renewal of Broadcast Station License for WBTW, Media General Opposition to Petition to Deny 39-44 (Dec. 14, 2004). Because these cases present the issue in specific, concrete factual settings, yet do not raise the wide variety of issues presented in the *2002 Biennial*, any one would present a better vehicle for revisiting the constitutional issues raised by Petitioners in this case, should this Court be inclined to do so.

II. THERE IS NO CONFLICT OVER THE INTERPRETATION OF §202(h) OF THE 1996 TELECOMMUNICATIONS ACT

Petitioner National Association of Broadcasters ("NAB"), along with Tribune, NAA, and Respondent Clear Channel Communications, Inc. ("Clear Channel")[11] assert there is a

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[10] Application for Renewal of Broadcast Station License for WBTW, FCC File No. BRCT-20040802BIK (Aug. 6, 2004), Application for Renewal of Broadcast Station License for WMBB, FCC File No. BRCT-20041001AQF (Oct. 7, 2004), Application for Renewal of Broadcast Station License for WRBL, FCC File No. BRCT-20041210BZP (Dec. 8, 2004).

[11] Clear Channel is a Respondent in 04-1033.

circuit split with respect to the FCC's construction of §202(h) of the 1996 Act. This is not so. All three members of the panel agreed that the court of appeals' construction is consistent with that of the D.C. Circuit. Their ruling that the periodic review mandated by §202(h) should employ the normal arbitrary and capricious test generally required by the Administrative Procedure Act is clearly correct and should not be disturbed. Nor is there reason for this Court to examine the court of appeals' unanimous conclusion that §202(h) allows the FCC to adopt stronger rules at the conclusion of the review process.

Although each of the petitioners emphasize the deregulatory thrust of the 1996 Act, there is no suggestion that the ruling below conflicts with any other circuit on this point. *See* Pet. App. 34a (majority noting that 1996 Act is deregulatory); Pet. App 122a (concurring judge noting the "deregulatory flavor" of the 1996 Act). Nor do any of the Petitioners point to express language in any statute that prohibits the FCC from increasing its regulatory oversight when the record justifies such action. Under this Court's jurisprudence, the FCC is entitled to deference in construction of statutory ambiguities such as this, *see, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001), and the petitions surely do not raise an issue here that would support issuance of a writ of certiorari.

1. Tribune, NAA, Sinclair, and Clear Channel argue that the Third Circuit's holding that §202(h) does not impose a more exacting standard of review is in conflict with that of the D.C. Circuit. *See* 04-1036 Pet. 24-26; 04-1045 Pet. 19-23; 04-1177 Cross-Pet. 11-12; Clear Channel Br. 24-27. These arguments mischaracterize the sequence in which the FCC and the D.C. Circuit acted and downplay the D.C. Circuit's definitive decision in *Cellco Partnership v. FCC*, 357 F.3d 88 (D.C. Cir. 2004). As the Third Circuit joined *Cellco*

in holding that the phrase "necessary in the public interest" [12] did not create a deregulatory presumption, and "endorsing the [FCC]'s view that 'necessary' must mean the same thing in the periodic review context as in the rulemaking context," Pet. App. 31a, there is no conflict.[13]

Clear Channel's quotations of fragments from *Cellco* are misleadingly incomplete, as can be seen by reference to the complete passages from which Clear Channel quotes. For example, Clear Channel claims that *Cellco*, "expressly extended to Section 11 the 'presumption in favor of repealing or modifying covered rules' that the D.C. Circuit had found inherent in Section 202(h)." Clear Channel Br. at 26 (quoting *Cellco*, 357 F.3d at 97). What *Cellco* actually said was that "the [FCC] agreed that *where §11's conditions are met*, §11 creates a presumption in favor of repealing or modifying" the

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[12] The provision directly at issue in *Cellco* was §11 of the 1996 Act, a biennial review provision that, just like §202(h), requires the FCC to repeal or modify regulations no longer "necessary in the public interest."

[13] Petitioners rely on the D.C. Circuit's pre-*Cellco* decisions in *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002) ("*Fox I*"), and *Sinclair v. FCC*, 284 F.3d 148 (D.C. Cir. 2002) ("*Sinclair*"). However, the D.C. Circuit later modified the *Fox I* decision to "leave unresolved precisely what §202(h) means." *Fox Television Stations, Inc. v. FCC*, 293 F.3d 537, 540 (D.C. Cir. 2002) ("*Fox II*"). Moreover, *Cellco* explicitly discussed and harmonized its ruling with those in *Fox I*, *Fox II* and *Sinclair*. 357 F.3d at 97-98. The *Cellco* panel pointed out that "shortly after *Sinclair* was decided, the court in [*Fox II*] retracted *Fox I*'s definition of 'necessary'" and that "the court in *Sinclair* did not adopt a general presumption in favor of modification or elimination of regulations." 357 F.3d at 98. Thus, for example, when NAB refers (04-1033 Pet. 22, *see also* 04-1036 Pet. 24, 04-1045 Pet. 19) to *Fox I* and *Sinclair* as imposing "a presumption in favor of repealing or modifying the ownership rules," it ignores the subsequent *Cellco*, ruling, which specifically stated that "neither *Fox I* nor *Sinclair* adopted a controlling definition of 'necessary,' much less the position that §11 embodies a presumption in favor of deregulation." 357 F.3d at 98. Importantly, the *2002 Biennial*, which purports to rely on *Fox I* and *Sinclair*, Pet. App. 215a (*2002 Biennial* ¶11), was issued prior to the *Cellco* decision.

rules. 357 F.3d at 97 (emphasis added). Indeed, there is no dispute within or among the circuits that when a regulation is found no longer to be in the public interest that there is a presumption in favor of repeal or modification. *See id.* at 99. Similarly, although Clear Channel claims that *Cellco* imposes obligations that go "beyond [the FCC's] normal monitoring responsibilities," Clear Channel Br. at 26 (quoting *Cellco*, 357 F.3d at 99), the decision's preceding sentence makes clear that the *Cellco* court was referring to remedies, not the threshold test. 357 F.3d at 99 ("The [FCC] reasonably concluded that the deregulatory presumption arises only after it has determined under §11(a) that a regulation is no longer necessary in the public interest.").

2. NAB, supported by Clear Channel, presents a second statutory argument, claiming that the deregulatory goals of the 1996 Act permit the FCC only to deregulate and precludes it from ever tightening its radio ownership regulations at the conclusion of a biennial review. 04-1033 Pet. 19-26; Clear Channel Br. 20-24. There is no suggestion of a circuit conflict on this point, and no specific statutory provision governs this question. This, then, is also an issue as to which the FCC is entitled to substantial deference. *See, e.g.,. Mead,* 533 U.S. at 229.

NAB argues (04-1033 Pet. 22) that "Sections 202(b) and 202(h) together express a clear directive that local ownership restrictions not be tightened," but none of the language it cites from the statute or the D.C. Circuit's *Fox* and *Sinclair* decisions addresses the particular issue presented here. To say that "Congress set in motion a process to deregulate the structure of the broadcast and cable industries," 04-1033 Pet. 22 (quoting *Fox I*, 280 F.3d at 1033), is not inconsistent with an agency determination that the deregulatory process can be accomplished with one step backward and three steps forward.

Both NAB and Clear Channel likewise maintain that the phrase "repeal or modify" must be read so that "modify" means only "that the [FCC] can relax existing restrictions; it does not authorize the [FCC] to tighten them." 04-1033 Pet. 23; *see also* Clear Channel Br. 20, and that the court of appeals ruling "conflicts with the text and structure of Section 202 as a whole." Clear Channel Br. 21. There is no basis to disturb the court of appeals' holding on this point. As the panel majority reasonably explained, the deregulatory goal of §202(h) is fulfilled by "requir[ing] the [FCC] periodically to justify its existing regulations, an obligation it would not otherwise have." Pet. App. 34a. *See also id.* at 124a ("Despite §202(h)'s admittedly deregulatory tenor, the statute does not foreclose the possibility of increased regulation under the biennial review if the [FCC] finds such action in the public interest.") (Scirica, C.J., concurring in part and dissenting in part). There is nothing important or novel about this garden variety question of statutory construction, or the resolution of it below, much less anything which would rise to the level of significance to merit this Court's attention.

III. ROUTINE APPLICATION OF WELL-SETTLED ADMINISTRATIVE LAW STANDARDS DOES NOT MERIT THIS COURT'S INTERVENTION

1. Both NAA and the Government's Conditional Cross-Petition contend (04-1045 Pet. 23-25; 04-1168 Cross-Pet. 21-28) that the court of appeals did not afford sufficient deference to the FCC's decisionmaking.[14] Yet neither claims that

[14] The deference claim is not raised by other industry Petitioners. Like Public Interest Respondents, many industry Petitioners argued to the court below that certain FCC decisions were arbitrary and capricious. *See* Pet. App. 52a (industry petitioners argued exclusion of cable but inclusion of internet in diversity index arbitrary and capricious); 58a (industry petitioners argued "equal market shares" assumption arbitrary and capricious); 103a (industry petitioners argued specific local radio limits arbitrary and capricious).

the court failed to articulate the correct deference standards. *See* 04-1045 Pet. 24; 04-1168 Cross-Pet. 23, 27. Indeed, the court below correctly noted that its scope of review was narrow, Pet. App. 25a, that it was not to substitute its judgment for that of the agency, *id.*, and that "[d]eference to the [FCC]'s judgment is highest when assessing the rationality of the agency's line-drawing endeavors," *id.* at 62a. The court remanded only when the agency's decision was "not supported by substantial evidence." *Id.* at 25a. Importantly, there was no disagreement between the majority and Chief Judge Scirica about the proper legal standards, *compare id.* at 24a-26a, *with id.* at 116a-118a; the only disagreement was over the application of those standards to specific rules at issue. At bottom, NAA and the Government simply quarrel over this application of law to fact. That issue does not merit review. Sup. Ct. R. 10.

2. Notwithstanding the fact that this issue does not warrant intervention by this Court, the court of appeals' decision to remand certain rules was correct. The Government claims (04-1168 Cross-Pet. 21) that the court of appeals should have deferred to the FCC's decision to assume equal market shares for outlets within the same media. The flaw in this argument, as the court observed, is that this equal market share assumption conflicted with other parts of the *2002 Biennial*, where the FCC expressly found that there was "no reason to believe that all media are of equal importance." Pet. App. 59a (quoting *2002 Biennial* ¶409). The court correctly pointed out that "the assignment of equal market shares generates absurd results," such as the Dutchess Community College television station receiving a market share *equal to* New York City's ABC affiliate and *higher than* the *New York Times*. Pet. App. 59a. In sum, the court found that "assuming equal market shares [is] unrealistic and inconsistent with the [FCC]'s overall approach . . . and proffered rationale," and thus it properly remanded that decision. *Id.* at 61a.

The Government also questions (04-1168 Cross-Pet. 24) the deference given to the FCC's decision to give substantial weight to the internet in the FCC's Diversity Index. Once again, however, the court appropriately remanded in light of the FCC's failure to explain obvious inconsistencies. The court correctly noted that the FCC's rationale for excluding cable television from the Diversity Index also necessarily applied to the internet. *See* Pet. App. 52a-58a. For example, while the FCC discounted cable where a survey suggesting that cable was a source of local news conflicted with other record evidence, the FCC failed to discount the internet under analogous circumstances. *Id.* at 55a.[15] Because the similarities between cable television and the internet required consistent treatment, the court properly found that the "decision to count the Internet as a source of viewpoint diversity, while discounting cable, was irrational." *Id.* at 52a.

Finally, the Government challenges (04-1168 Cross-Pet. 27-28) the court of appeals' review of specific limits chosen regarding cross-media and local radio station ownership. But in fact the court *upheld* many of the FCC's line-drawing decisions, *see id.* at 75a (upholding "top-four restriction" on local TV ownership), 85a (upholding local radio market definition), only remanding those that were marred by inconsistencies. For example, the specific limits created by the FCC, purportedly developed to prevent "problematic levels of concentration," *id.* at 509a (*2002 Biennial* ¶435), would have allowed certain media combinations resulting in considerably higher concentration levels than others that were prohibited. The court correctly held that "[t]he [FCC]'s failure to provide any explanation for this glaring inconsistency is without a

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[15] Further, the court noted that the FCC's attempt to justify the differential treatment by arguing that local cable news is not available to everyone while the internet is was inconsistent with the FCC's recognition (elsewhere in the *2002 Biennial*) that nearly one-third of Americans have no internet access. Pet. App. at 57a-58a.

doubt arbitrary and capricious." *Id.* at 63a. Thus, while the court properly engaged in highly deferential review of specific limits chosen by the FCC, it did not abdicate its responsibility to remand when the lines drawn were not supported by the record and therefore "patently unreasonable." *Sinclair*, 284 F.3d at 162.[16]

It is a truism that this Court is "'[a] court of law . . . rather than a court for correction of errors in fact finding.'" *Missouri v. Jenkins*, 515 U.S. 70, 162 (1995) (Souter, J., dissenting) (quoting *Graver Tank & Mfg. Co. v. Linde Air Prod. Co.*, 336 U.S. 271, 275 (1949)). As the decision below rests upon a correct understanding of this Court's principles of administrative deference, Petitioners' contention is simply that the court of appeals misapplied the law to the facts of this case. As explained above, that case-specific issue does not merit this Court's attention.

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[16] The Government also challenges (04-1168 Pet. 27-28) the remand of the FCC's specific local radio ownership limits. Once again, the court of appeals remanded these limits because of the irrational and inconsistent manner in which they were developed. For example, the court pointed out that the FCC failed to explain why it ignored the DOJ/FTC Merger Guidelines in developing the local radio limits, but expressly relied on the Guidelines in developing analogous local television ownership limits. Pet. App 103a. Further, while the rationale for the local radio ownership limits depended heavily on the theory that a certain number of equal-sized competitors would make a market competitive, the court correctly noted that "record evidence supports neither actual nor potential existence of equal-sized competitors" in the local radio market. *Id.*

CONCLUSION

For the foregoing reasons, this Court should deny the petitions for a writ of certiorari.

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(6)

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No. 04-1020

IN THE

Supreme Court of the United States

MEDIA GENERAL, INC.

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
I. Respondents' Substantive Objections Are Meritless.	2
A. The Scarcity Doctrine	2
B. Due Process/Equal Protection	4
C. Content Neutrality	5
II. Respondents' Procedural Objection Is Meritless.	7
CONCLUSION	10

TABLE OF AUTHORITIES

Page(s)

CASES

Action for Children's Television v. FCC,
58 F.3d 654 (D.C. Cir. 1995) (*en banc*) 2
Ashcroft v. Raich,
No. 03-1454, *cert. granted*, 124 S. Ct. 2909 (2004) 8
City of Rancho Palos Verdes v. Abrams,
125 S. Ct. 1453 (2005) 8
Consolidated Edison Co. v. Public Serv. Comm'n of N.Y.,
447 U.S. 530 (1980) 6
Consumer Elecs. Ass'n v. FCC,
347 F.3d 291 (D.C. Cir. 2003) 4
Dura Pharms., Inc. v. Broudo,
125 S. Ct. 1627 (2005) 8
FCC v. National Citizens Comm. for Broad.,
436 U.S. 775 (1978) 1, 4, 5, 6, 7, 8, 9
Gillespie v. United States Steel Corp.,
379 U.S. 148 (1964) 8
Gonzales v.
O Centro Espirita Beneficiente Uniao do Vegetal,
No. 04-1084,
cert. granted, 2005 WL 349538 (Apr. 18, 2005) 8
In re Compl. of Syracuse Peace Council,
2 F.C.C.R. 5043 (1987),
pet. for review denied, 867 F.2d 654 (D.C. Cir. 1989) 3
Johnson v. California,
125 S. Ct. 1141 (2005) 9
Land v. Dollar,
330 U.S. 731 (1947) 8
National Cable & Telecomm. Ass'n v.
Brand X Internet Servs.,
No. 04-277,
cert. granted, 125 S. Ct. 654 (2004) 8

National Citizens Comm. for Broad. v. FCC,
555 F.2d 938 (D.C. Cir. 1977),
aff'd in part, rev'd in part, 436 U.S. 775 (1978) 8
Red Lion Broad. Co. v. FCC,
395 U.S. 367 (1969) 1, 3
Sinclair Broad. Group, Inc. v. FCC,
284 F.3d 148 (D.C. Cir. 2002) 6
Turner Broad. Sys., Inc. v. FCC,
512 U.S. 622 (1994) 2
United States v. General Motors Corp.,
323 U.S. 373 (1945) 8
United States v. Wells,
519 U.S. 482 (1997) 5
Ward v. Rock Against Racism,
491 U.S. 781 (1989) 6

OTHER AUTHORITIES

Stern, Robert *et al.*,
Supreme Court Practice (8th ed. 2002) 6, 8

INTRODUCTION

Respondents do not dispute that the petition presents constitutional issues of exceptional importance; rather, respondents simply insist that the law on those issues is "settled," Br. for the Federal Resp'ts ("U.S. Br.") 15, or "clearly established," Br. in Opp. for Public Interest Resp'ts ("Prometheus Br.") 2. But that is precisely Media General's point: the law on these important constitutional questions is frozen in amber circa 1978, and only this Court—not Congress, the FCC, or the lower courts—is in a position to do anything about it. On each of the three constitutional questions presented in the petition, this Court's decision in *FCC v. National Citizens Comm. for Broad.* ("*NCCB*"), 436 U.S. 775 (1978), establishes not only the law of the land, but the rules of the road for broadcast regulation. For this reason, respondents' suggestion that this Court's review would be "premature" because the Third Circuit remanded the case to the agency, Prometheus Br. 2; *see also* U.S. Br. 12-14, has an Alice-in-Wonderland quality about it. It makes no sense to think that the FCC can meaningfully regulate broadcasting without first knowing the proper legal standard governing broadcast regulation. Respondents' procedural argument thus collapses back on their substantive argument that the law in this area is settled. Indeed, respondents' arguments only prove that, far from being "premature," this Court's return to this area of the law is *overdue* because the premises underlying *NCCB* (and its precursor, *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969)), have long since been eroded. And because there are few issues of greater practical and legal importance to a free society than the extent of government control over media of mass communication, this Court should grant the petition.

I. Respondents' Substantive Objections Are Meritless.

A. The Scarcity Doctrine

As noted above, respondents miss the point by insisting that the scarcity doctrine, which provides the doctrinal underpinning for stripping broadcast media of the robust First Amendment protection afforded to other media, is "good law." U.S. Br. 19; *see also* Prometheus Br. 2-11. Of course it is "good law" in the sense that it has never been repudiated by this Court. The whole point of the petition, however, is respectfully to submit that it is not "good law" in the fundamental sense that it represents a proper interpretation of the First Amendment.

Precisely because the scarcity doctrine remains "good law" in the first sense, the lower courts are *not* free to hold that it no longer remains "good law" in the second sense, and hence it is only natural that "there is no conflict among the circuits regarding the scarcity doctrine." Prometheus Br. 9 (capitalization modified). But lower-court judges *are* free to opine that the doctrine "makes no sense now," *Action for Children's Television v. FCC*, 58 F.3d 654, 673 (D.C. Cir. 1995) (*en banc*) (Edwards, C.J., dissenting), and a wide array of them—from Judge Edwards to Judge Bork, from Judge Arnold to Judge Williams—have done so. *See* Pet. 14-17. This sustained criticism from prominent lower-court judges across the jurisprudential spectrum underscores that this Court's review of the ongoing validity of the scarcity doctrine is not only warranted, but long overdue. Indeed, this Court itself noted over a decade ago that the scarcity rationale has been "criticized ... since its inception," *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 638 & n.5 (1994) (citing courts and commentators), and signaled a willingness to reconsider the doctrine's validity, *see id.* at 637 ("[T]he rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, *whatever its validity in the cases elaborating it*, does not apply in the context of cable regulation.") (emphasis added).

Respondents insist, however, that review is unwarranted on the ground that neither the FCC nor Congress has sent a "signal" that it is time to discard the scarcity doctrine. U.S. Br. 19-21; Prometheus Br. 4-8. Putting aside the threshold anomaly of waiting for government regulators to send a "signal" that greater constitutional scrutiny of their regulations is warranted, the FCC unequivocally sent such a "signal" in *In re Compl. of Syracuse Peace Council*, 2 F.C.C.R. 5043 (1987), *pet. for review denied*, 867 F.2d 654 (D.C. Cir. 1989). The United States now tries to disavow that "signal," arguing that it applied only to the fairness doctrine. *See* U.S. Br. 19-20. But that argument is demonstrably incorrect: the FCC in *Syracuse Peace Council* specifically responded to this Court's invitation for a "signal" that the time had come to reconsider the scarcity doctrine: "[I]n response to the question raised by the Supreme Court in *League of Women Voters*, we believe that the standard applied in *Red Lion* should be reconsidered and that the constitutional principles applicable to the printed press should be equally applicable to the electronic press." 2 F.C.C.R. at 5053.[1] If anything, the FCC's current attempt to disavow *Syracuse Peace Council* only underscores that this Court cannot

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[1] *See also* 2 F.C.C.R. at 5048 ("[T]he extraordinary technological advances that have been made in the electronic media since the 1969 *Red Lion* decision, together with a consideration of fundamental First Amendment principles, provide an ample basis for the Supreme Court to reconsider the premise or approach of its decision in *Red Lion*."); *id.* at 5053 ("[T]he scarcity rationale developed in the *Red Lion* decision and successive cases no longer justifies a different standard of First Amendment review for the electronic press."); *id.* at 5054 ("We do not believe that any scarcity rationale justifies differential First Amendment treatment of the print and broadcast media."); *id.* at 5055 ("We simply believe that, in analyzing the appropriate First Amendment standard to be applied to the electronic press, the concept of scarcity—be it spectrum or numerical—is irrelevant."); *id.* at 5058 ("[T]he dramatic transformation in the telecommunications marketplace provides a basis for the Court to reconsider its application of diminished First Amendment protection to the electronic media.").

rely on the agency to declare that the time has come for greater constitutional scrutiny of agency action.

At the end of the day, respondents' argument boils down to the proposition, articulated by the Third Circuit below, that "[t]he abundance of non-broadcast media does not render the broadcast spectrum any less scarce." App. 47a; *see also* U.S. Br. 16-18; Prometheus Br. 8-9. That proposition, as explained in the petition, ignores the critical point that technological advances have eroded the boundaries between broadcast and non-broadcast media, so that it no longer makes sense to subject broadcasting to a distinct regulatory regime. Thus, even if available broadcast spectrum were static (which it is not, *see, e.g., Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 293-94 (D.C. Cir. 2003)), broadcasting cannot sensibly be analyzed in isolation from other media. At the very least, the time has come for this Court to reconsider this important issue.

B. Due Process/Equal Protection

Respondents next argue that Media General's due process/equal protection challenge—based on the fact that newspapers are the *only* non-broadcast medium subject to broadcast ownership restrictions—is again foreclosed by *NCCB*. *See* U.S. Br. 22-24; Prometheus Br. 11-14. Again, the Third Circuit agreed, *see* Pet. App. 45-46a, and again that point only underscores that the time has come to revisit *NCCB*.

The federal respondents turn Media General's position on its head by asserting that Media General "conten[ds] that the FCC was constitutionally required to apply the cross-media rule to cable systems and Internet websites." U.S. Br. 23. That is not true. Media General is not advocating greater government regulation of *any* speech; rather, Media General is simply noting that the government cannot justify discriminatory regulation of *newspapers* when the same justification would also apply to other non-broadcast media.

Respondents insist, however, that newspapers legitimately differ from cable and the Internet, because only newspapers provide "'*local* news and information.'" U.S. Br. 22 (quoting Pet. App. 520a) (emphasis added); *see also* Prometheus Br. 12. Respondents then assert, based on *NCCB*, that this difference justifies applying the cross-ownership rule to newspapers. *See* U.S. Br. 24; Prometheus Br. 11-12. But even if that assertion were factually correct, which it is not, it would only underscore the need to reconsider *NCCB*. The Third Circuit expressly declined to consider this point, saying that it was bound by *NCCB*, and that this Court alone could decide whether *NCCB*'s premises have been eroded. *See* Pet. App. 46a ("We decline ... to disregard Supreme Court precedent because of changing times ... [I]t is the Supreme Court's prerogative to change its own precedent."). Accordingly, unless and until this Court reconsiders *NCCB* on this ground too, the agency and the lower courts will continue to regulate newspaper/broadcast cross-ownership as if nothing had changed since 1978.

C. Content Neutrality

Respondents finally assert that Media General's content-neutrality argument does not merit review "because this Court has already addressed the question, holding that newspaper/broadcast cross-ownership regulations 'are not content related.'" Prometheus Br. 15 (quoting *NCCB*, 436 U.S. at 801); *see also* U.S. Br. 21-22. Again, however, that assertion only underscores that the time is ripe to reconsider *NCCB*.[2]

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[2] Respondents Prometheus *et al.* (although tellingly not the United States) assert in passing that "review of this argument is inappropriate because it was not *addressed* in the decision below." Prometheus Br. 15 (emphasis added). That assertion is manifestly incorrect; Prometheus does not dispute that Media General pressed this argument below, so it is squarely presented for this Court's review. *See, e.g., United States v. Wells*, 519 U.S. 482, 488 (1997) (noting "this Court's traditional rule that we may address a question properly presented in a petition for certiorari if it was [1] pressed in *or* [2] passed on by the Court of Appeals") (emphasis and brackets added; internal

Respondents cannot, and do not, deny that the whole point of cross-ownership restrictions is "to promote viewpoint diversity." Pet. App. 225a; *see also id.* at 453a ("[W]e continue to believe that diversity of ownership can advance our goal of diversity of viewpoint."). Whether or not the restrictions actually serve that goal—a most dubious proposition—there can be no doubt that the goal itself is explicitly content-based.

Respondents insist that newspaper/broadcast cross-ownership restrictions are content-neutral because they are not based on "'disagreement with the *message*'" conveyed. U.S. Br. 22 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (emphasis added)); *see also* Prometheus Br. 15. But that simply blurs content-neutrality with viewpoint-neutrality. The very premise here is that broadcast stations owned by newspapers have a distinctive "viewpoint." Even assuming that this premise is *viewpoint* neutral, it certainly is not *content* neutral; to the contrary, it is based on assumptions about the content of the speech. As *Ward* makes clear, a regulation is content-neutral only if "it is *justified* without reference to the content of the regulated speech." *Ward*, 491 U.S. at 791 (internal quotation omitted; emphasis added in *Ward*). Because newspaper/broadcast cross-ownership restrictions are expressly justified by reference to the content of the speech—"diversity of viewpoint," Pet. App. 453a—they are not content neutral. And because *NCCB*, without any analysis, simply declared that such restrictions are "not content related," 436 U.S. at 801, a declaration that is impossible to square with this Court's other pronouncements on the topic, *see, e.g., Consolidated Edison Co. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 537 (1980); *Ward*, 491 U.S. at 791, and that has foreclosed the lower courts from concluding otherwise, *see, e.g., Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 168 (D.C. Cir. 2002), this Court should review this issue too.

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quotation omitted); Robert Stern *et al.*, *Supreme Court Practice* § 6.26, at 421 (8th ed. 2002).

II. Respondents' Procedural Objection Is Meritless.

In addition to their substantive objections to certiorari, respondents also advance a procedural objection: that review now would be "premature" because the Third Circuit vacated the FCC's revised cross-ownership restrictions and remanded the matter to the agency. Prometheus Br. 2; *see also* U.S. Br. 12-14. If ever there were a perverse argument, this is it.

Although this is now the year 2005 (and a decision by this Court presumably would not be forthcoming until the year 2006), at issue here is the *2002 Biennial Regulatory Review*. Media General's position all along, since the beginning of this process more than three years ago, has been that restrictions on newspaper/broadcast cross-ownership are subject to heightened constitutional scrutiny. The FCC, relying on *NCCB*, squarely rejected that position, *see* Pet. App. 215-19a, as did the Third Circuit, also relying on *NCCB*, *see* Pet. App. 45-48a. Accordingly, whether that position is right or wrong is now squarely presented here, and there is no reason to delay the resolution of these threshold constitutional questions.

Indeed, the core fallacy underlying respondents' procedural argument is that the FCC will be able to adopt revised newspaper/broadcast cross-ownership restrictions on remand without any consideration of the proper constitutional standard of review. That is simply not so. Reasoned and responsible regulation obviously requires appreciation of the relevant constitutional constraints. *See, e.g.*, Pet. App. 215a ("The ownership rules we adopt in this proceeding must be consistent ... with the First Amendment."). Thus, the agency cannot properly implement any remand (and the Third Circuit cannot properly review any such implementation) without knowing whether *NCCB* continues to provide the governing legal principles. The constitutional issue, in other words, is not going away. Unless this Court grants the petition, *NCCB* will govern any further proceedings on remand. Thus, what respondents are

really requesting is not avoidance of constitutional issues, but resolution of constitutional issues by default.

Because both the FCC and the Third Circuit ruled on the underlying constitutional issues, and those issues are "fundamental to the further conduct of the case," those issues are fully ripe for this Court's review. *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *see also Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964) (same); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) (same); *see generally* Stern, *supra*, § 4.18, at 259-60. Indeed, *NCCB* itself arose in this precise procedural posture, since the D.C. Circuit in that case partially affirmed and partially reversed the FCC's original cross-ownership restrictions, and remanded to the agency. *See* 555 F.2d 938, 966-67 (1977). Not surprisingly, a sizeable chunk of this Court's docket—in this current Term as well as any other Term—consists of cases in which the court below resolved a threshold legal question but remanded for further proceedings. *See, e.g., Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, No. 04-1084, *cert. granted*, 2005 WL 349538 (Apr. 18, 2005); *City of Rancho Palos Verdes v. Abrams*, 125 S. Ct. 1453 (2005); *Dura Pharms., Inc. v. Broudo*, 125 S. Ct. 1627 (2005); *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, No. 04-277, *cert. granted*, 125 S. Ct. 654 (2004); *Ashcroft v. Raich*, No. 03-1454, *cert. granted*, 124 S. Ct. 2909 (2004).[3]

Contrary to respondents' assertion, thus, Media General is not asking this Court "to entertain abstract issues of constitutional law." U.S. Br. 13-14. The proper constitutional

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[3] The United States' suggestion that review is unwarranted in this posture comes with particular ill grace, since the United States—probably more than any other litigant—routinely urges this Court to grant certiorari in cases in which the court of appeals has established the "legal framework" for a remand. Reply Br. for the U.S. at 8, *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, No. 04-1084 (3/29/05) (cert. granted on Apr. 18, 2005); *see also* Reply Br. for the U.S. at 10, *United States v. Olson*, No. 04-759 (2/17/05) (cert. granted on Mar. 7, 2005).

standard of review governing particular types of official action does not present an "abstract" question; to the contrary, it presents a concrete question of the sort that this Court routinely addresses. *See, e.g., Johnson v. California*, 125 S. Ct. 1141, 1146 (2005) ("We granted certiorari to decide which standard of review applies" to a claim of racial discrimination in the prison context). All three of the questions presented in Media General's petition ask this Court to reconsider the deferential standard of review set forth in *NCCB* and duly applied by the agency and the Third Circuit below. Indeed, the fact that the Third Circuit decided the threshold constitutional questions, *see* Pet. App. 45-48a, even though it ultimately vacated and remanded the cross-ownership restrictions on administrative law grounds, *see* Pet. App. 48-66a, only underscores that the petition does not present "abstract issues." Because the extent of the FCC's constitutional latitude to impose cross-ownership restrictions is independent of (and logically and legally antecedent to) the proper scope of any particular restriction, no reformulation of the cross-ownership restrictions in any remand would affect the constitutional analysis.

Needless to say, respondents' insistence that the constitutional questions presented here are "settled" belies their suggestion that those questions are not yet ripe. Respondents, having prevailed on the constitutional issues below, may be happy to engage in a protracted game of constitutional hide-the-ball, but Media General is not—particularly since Media General's constitutional rights continue to be infringed by the cross-ownership restrictions, which not only prevent Media General from acquiring broadcast stations, but—unless waivers are granted—require Media General to divest existing properties.[4]

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[4] Respondents Prometheus *et al.* (but again, tellingly, not the United States) suggest that individual waiver proceedings "present a better vehicle for revisiting the constitutional issues" than this case. Prometheus Br. 17. That suggestion is baseless; if anything, the far-reaching constitutional issues

In any event, the United States' insistence that "[i]n the current posture of this case, ... there is an *unreversed* determination that the Commission failed adequately to justify the new rules under ordinary, nonconstitutional standards applicable to judicial review of administrative action," U.S. Br. 13 (emphasis added), makes no sense. Of course the Third Circuit's decision on the administrative law issues is "unreversed"; this Court has not yet had the chance to reverse it. But several of the petitioners and cross-petitioners here, *including the United States itself, see* Conditional Cross-Pet. for a Writ of Cert. at 19-28 (No. 04-1168); *see also* Pet. for a Writ of Cert. at 23-25 (No. 04-1045), have asked this Court to do just that. Accordingly, if this Court would like to consider the particular cross-ownership restrictions adopted by the FCC and reviewed by the Third Circuit, those restrictions are most certainly before the Court.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

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presented here are most naturally addressed in the context of a global rulemaking, not individual adjudications. Indeed, other self-described "public interest" groups (represented by respondents' counsel of record) have taken precisely the opposite position before the FCC, insisting that "[a] waiver pending rulemaking would amount to regulation by waiver, gutting the Commission's rulemaking process." Pet. to Deny, *In the Matter of Application for Renewal of Broad. Station Licenses*, FCC No. BRCT-20040802BIK (filed 11/1/04), at 32.

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